Supreme Court, U.S.
FILED

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In The

Supreme Court of the United States

ALBERTO SALDAJENO, *et al.*,

Petitioners,

v.

ISHIHARA SANGYO KAISHA LTD., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEF TIBOR DEUTSCH, an individual; JOSEF TIBOR DEUTSCH, as the survivor of George Deutsch,
Plaintiffs-Appellants,

v.

TURNER CORPORATION, a Delaware Corporation with corporate regional headquarters located in California; KITCHELL CORPORATION USA, an Arizona Corporation authorized to do business in California; HOCHTIEF AG, German Corporation,
Defendants-Appellees.

No. 00-56673

D.C. No.
CV-00-04405-SVW

Appeal from the United States District Court
for the Central District of California
Stephen V. Wilson, District Judge, Presiding

WOODROW M. HUTCHISON,
Plaintiff-Appellant,

v.

MITSUBISHI MATERIALS CORPORATION; MITSUBISHI MATERIALS USA, a business association purporting to be a California corporation; MITSUBISHI CORPORATION, a Japanese business association; MITSUBISHI INTERNATIONAL CORPORATION, a business association purporting to be a New York corporation;

No. 01-17115

D.C. No.
CV-00-02163-VRW

MITSUBISHI HEAVY INDUSTRIES, LTD., a Japanese business association; MITSUBISHI HEAVY INDUSTRIES AMERICA, INC., a business association purporting to be a Delaware corporation,
Defendants-Appellees.

LESTER I. TENNY,
Plaintiff-Appellant,

v.

MITSUI & CO., LTD., a Japanese business association; MITSUI & CO (USA), INC, a business association purporting to be a New York Corporation; MITSUI MINING CO LTD, a Japanese business association; MITSUI MINING USA INC, a business association purporting to be a Delaware corp.,
Defendants-Appellees.

No. 01-17116

D.C. No.
CV-00-02357-VRW

SHIRLEY M. RUBENSTEIN; JULIA E. STEVENSON; GLEN LEROY, individually and on behalf of a class of persons similarly situated,
Plaintiffs-Appellants,

v.

ISHIHARA SANGYO KAISHA, LTD; ISHIHARA CORPORATION, a California corporation, ISK AMERICAS, INC., a Delaware corporation,
Defendants-Appellees.

No. 01-17123

D.C. No.
CV-00-03737-VRW

RAYMOND HEIMBUCH; VIVIAN O. JOHNSON; WILLIAM R. LOWE; SAM P. BUSE; ALFRED BEREST; EDWIN F. LINDROS; MICHAEL BIBIN; J. S. GRAY; KARL WILLIAM HOLT; NORMAN R. MATTHEWS; DARREL D. STARK; CARMEL ZIPETO,
Plaintiffs-Appellants,

v.

ISHIHARA SANGYO KAISHA, LTD; a Japanese business association; ISHIHARA CORPORATION; ISK AMERICAS, INC., a business association purporting to be a Delaware corporation,
Defendants-Appellees.

No. 01-17124

D.C. No. CV-00-00064-VRW

MELODY SOLIS, individually and on behalf of a class of persons similarly situated,
Plaintiff-Appellant,

v.

NIPPON STEEL CORPORATION, a Japanese business association; NIPPON STEEL TRADING CO., LTD., a Japanese business association; NIPPON STEEL USA INC, a business association purporting to be a New York corporation; NIPPON STEEL TRADING AMERICA,
Defendants-Appellees.

No. 01-17134

D.C. No. CV-00-02359-VRW

HARRY CORRE,
Plaintiff-Appellant,

v.

MITSUI & CO. LTD; MITSUI & COMPANY (USA), INC.; MITSUI MINING USA INC; MITSUI MINING CO., LTD.,
Defendants-Appellees.

No. 01-17155

D.C. No.
CV-00-02690-VRW

GARTH G. DUNN
Plaintiff-Appellant,

v.

NIPPON STEEL CORPORATION, a Japanese business association; NIPPON STEEL USA, a business association purporting to be a New York Corp.,
Defendants-Appellees.

and

JAPAN IRON & STEEL, a Japanese business association; YAWATA IRON & STEEL, a Japanese business association; FUJI IRON & STEEL, a Japanese business association; MITSUBISHI CORPORATION, a Japanese business association; MITSUBISHI SHOJI; SUMITOMO CORP.; SUMITOMO COMMERCIAL COMPANY, a Japanese business association,
Defendants.

No. 01-17157

D.C. No.
CV-00-03239-VRW

JAMES O. KING,
Plaintiffs-Appellants,

v.

NIPPON STEEL CORP; NIPPON STEEL USA,
Defendants-Appellees.

No. 01-17160
D.C. No.
CV-99-05042-VRW

PERFECTO LLANZA, on his own behalf and on behalf of all others similarly situated, ALBERTO SALDEJENO; ACELOPIO GALEDO; GENEROSO JACOB; ERNESTO SANTO DOMINGO; IMELDA SANTO DOMINGO,
Plaintiffs-Appellants,

v.

MITSUI & CO (USA), INC, a business association; MITSUI MINING CO., LTD., a Japanese business association; MITSUBISHI CORPORATION; NIPPON STEEL CORP, a Japanese business association; NIPPON STEEL USA INC.,
Defendants-Appellees.

No. 01-17172
D.C. No.
CV-00-03240-VRW

ALBERTO SALDAJENO; ACELOPIO GALEDO; GENEROSO JACOB, individually and on behalf of a class of persons similarly situated; PERFECTO LLANZA; ERNESTO SANTO DOMINGO; IMELDA SANTO DOMINGO,
Plaintiffs-Appellants,

v.

ISHIHARA SANGYO KAISHA, LTD, a Japanese business association; ISHIHARA CORPORATION (USA); TAIHEIYO CEMENT, a Japanese business association; ONODA USA; KREHA CORPORATION OF AMERICA, INC.; MITSUI & CO. (USA); SHOWA DENKO AMERICA, INC.; MITSUI MINING USA INC; FURUKAWA ELECTRIC NORTH AMERICA, INC.; NIPPON SHARYRO USA, INC.; SUMITOMO HEAVY INDUSTRIES (USA); NIPPON STEEL USA INC.; MITSUBISHI INTERNATIONAL CORPORATION; MITSUBISHI MATERIALS USA CORPORATION; MITSUBISHI HEAVY INDUSTRIES AMERICA, INC., *Defendants-Appellees*.	No. 01-17176 D.C. Nos. CV-00-02960-VRW CV-00-03240-VRW CV-00-03828-VRW
ERNESTO SANTO DOMINGO, individually and on behalf of a class of persons similarly situated; IMELDA SANTO DOMINGO, individually and on behalf of a class of persons similarly situated, *Plaintiffs-Appellants*, v. ISHIHARA SANGYO KAISHA, LTD; a Japanese corporation; ISHIHARA CORPORATION U.S.A., California corporation, *Defendants-Appellees*.	No. 01-17177 D.C. No. CV-00-03828-VRW

MANUEL A. ENERIZ; DEXTER ENERIZ, Executor of the Estate of Manuel A. Eneriz, *Plaintiffs-Appellants*, v. MITSUI & COMPANY LTD.; MITSUI & COMPANY (USA), INC.; MITSUI MINING COMPANY, LTD.; MITSUI MINING USA INC, *Defendants-Appellees*.	No. 01-17185 D.C. No. CV-00-02691-VRW
RALPH LEVENBERG, on behalf of himself and all others similarly situated, *Plaintiff-Appellant*, v. NIPPON SHARYO LTD.; NIPPON SHARYO USA., INC., *Defendants-Appellees*.	No. 01-17189 D.C. No. CV-99-01554-VRW
HAROLD W. POOLE, ERNEST LOY; FRANCIS W. AGNES; ROBERT C. CLARK; CLARENCE S. KELLOGG, *Plaintiffs-Appellants*, v. NIPPON STEEL CORP, a Japanese business association; NIPPON STEEL TRADING CO., LTD., a business association purporting to be a New York corporation; NIPPON STEEL TRADING AMERICA, a business association purporting to be a California corporation, *Defendants-Appellees*.	No. 01-17195 D.C. No. CV-00-02360-VRW

SUK YOON KIM, on behalf of himself and all others similarly situated, *Plaintiff-Appellant*, v. ISHIKAWAJIMA HARIMA HEAVY INDUSTRIES LTD.; IHI INC.; SUMITOMO HEAVY INDUSTRIES LTD.; SUMITOMO HEAVY INDUSTRIES (USA) INC., *Defendants-Appellees*.	No. 01-17197 D.C. No. CV-99-05303-VRW
ZHENHUAN MA, *Plaintiff-Appellant*, v. KAJIMA CORPORATION; KAJIMA CONSTRUCTION SERVICES, INC.; KAJIMA DEVELOPMENT CORPORATION; KAJIMA ENGINEERING AND CONSTRUCTION, INC.; KAJIMA INTERNATIONAL, INC.; KAJIMA U.S.A., INC., *Defendants-Appellees*.	No. 01-17201 D.C. No. CV-01-02592-VRW
SA SON SIN, *Plaintiff-Appellant*, v. MITSUI & CO, LTD.; MITSUI & CO. (USA); MITSUI ENGINEERING & SHIPBUILDING CO., LTD.; PACECO CORPORATION, *Defendants-Appellees*.	No. 01-17203 D.C. No. CV-00-03242-VRW

RUBEN RESUS; CARLOS CADENILLA, individually and on behalf of a class of persons similarly situated,
Plaintiffs-Appellants,

v.

MITSUI & CO. LTD., a Japanese business association; MITSUI BUSSAN KAISHA; MITSUI & CO (USA), INC; MITSUBISHI CORPORATION; MITSUBISHI INTERNATIONAL CORPORATION, a business corporation; MITSUBISHI HEAVY INDUSTRIES, LTD., a Japanese business association; MITSUBISHI HEAVY INDUSTRIES AMERICA INC., a business association; MITSUBISHI MATERIALS CORPORATION, a Japanese association; MITSUBISHI MATERIALS USA CORPORATION, a business association; SUMITOMO CORP., a Japanese business association; SUMITOMO CORP. OF AMERICA, a business association; KUREHA CORPORATION OF AMERICA, a business association; FURUKAWA ELECTRIC NORTH AMERICA, INC., a business association; TAIHEIYO CEMENT, a Japanese business association; ONODA USA INC., a business association; SHOWA DENKO K K, a Japanese business association,
Defendants-Appellees.

No. 01-17204

D.C. No.
CV-00-03313-VRW

SHANG-TING SUNG,
Plaintiff-Appellant,

v.

MITSUI & CO, LTD., MITSUI & CO. (USA); MITSUBISHI CORPORATION; MITSUBISHI INTERNATIONAL CORPORATION; MITSUI MINING CO., LTD.; MITSUI MINING USA INC,
Defendants-Appellees.

No. 01-17207

D.C. No. CV-00-02358-VRW

RAYMOND WHEELER; ALEC CHARLES MURPHY; WILLIAM SCHMITT; HENDRICK ZEEMAN; TAMMERUS WILLEM CARTER-VISSCHER; DAVID CLARKE; WILLEM HENDRIK DE HAAN,
Plaintiffs-Appellants,

v.

MITSUI & CO, LTD., a Japanese business association; MITSUI & COMPANY (USA), INC., a business association; MITSUI MINING COMPANY, LTD., a Japanese business association; MITSUI MINING USA INC; NIPPON STEEL USA; MITSUBISHI CORPORATION, MITSUBISHI INTERNATIONAL CORP.; MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.; MITSUBISHI MATERIALS USA CORPORATION; MITSUBISHI HEAVY INDUSTRIES, LTD.,
Defendants-Appellees.

No. 01-17210

D.C. No. CV-00-04278-VRW

JAE SIK CHOE,
Plaintiff-Appellant,

v.

NIPPON STEEL CORPORATION;
MITSUBISHI HEAVY INDUSTRIES, LTD.,
Defendants-Appellees.

No. 01-17211

D.C. No.
CV-99-05309-VRW

FRANK A. MENTE; NEVILLE J. BOOKER, individually and on behalf of persons similarly situated,
Plaintiffs-Appellants,

v.

MITSUI & CO. LTD, a Japanese association, aka/Mitsui Bussan Kaisha; MITSUI MINING COMPANY, LTD., a Japanese business association; MITSUI & COMPANY (USA), INC., a business association; NIPPON STEEL CORPORATION, a Japanese corporation; NIPPON STEEL USA INC., a business association; MITSUBISHI CORPORATION, a Japanese business association; MITSUBISHI MATERIALS USA CORPORATION; MITSUBISHI MATERIALS CORPORATION, a Japanese business association; MITSUBISHI HEAVY INDUSTRIES, LTD., a Japanese business association; MITSUBISHI INTERNATIONAL CORPORATION, a business corporation,
Defendants.

No. 01-17230

D.C. No.
CV-00-03530-VRW

and

MITSUI MINING USA INC, a business association; MITSUBISHI HEAVY INDUSTRIES AMERICA INC., a business association,
Defendants-Appellees.

AIZHU SU, on behalf of himself and all others similarly situated; CHUNSHENG TIAN, on behalf of himself and all others similarly situated,
Plaintiffs-Appellants,

v.

MITSUBISHI CORPORATION, a corporation; MITSUBISHI CORPORATION, a corporation; MITSUI & CO., LTD., a corporation; MITSUI MINING COMPANY, LTD., a corporation; MITSUI & COMPANY (USA), INC., a corporation; MITSUI MINING USA INC, a corporation,
Defendants-Appellees.

No. 01-17243

D.C. No.
CV-00-03586-VRW

DO GEUN OH; EUNG CHANG LEE; YONG HAE LEE, individually and on behalf of a class of persons similarly situated,
Plaintiffs-Appellants,

v.

MITSUI & CO., LTD, a Japanese business association; MITSUI & CO. (USA), a business association; MITSUBISHI CORPORATION, a Japanese business association;

No. 01-17251

D.C. No.
CV-00-03752-VRW

MITSUBISHI CORPORATION, a business association; MITSUBISHI HEAVY INDUSTRIES, LTD., a Japanese business association; MITSUBISHI HEAVY INDUSTRIES AMERICA, INC., a business association; MITSUBISHI MATERIALS CORPORATION, a Japanese business association; MITSUBISHI MATERIALS USA CORPORATION, a business association; NIPPON STEEL CORP, a Japanese business association; NIPPON STEEL USA, a business association; SHOWA DENKO AMERICA, INC., a business association; SHOWA KOGYO, a Japanese business association,

Defendants-Appellees.

GLORIA TYLER ALFANO; MADELINE FELKINS; WARREN CARRINGER; HOWARD FRIEDMAN, Dr.; RICHARD GORDON, Maj.; OAKIE DENT PACK, on behalf of themselves and all others similarily situated,

Plaintiffs-Appellants,

v.

MITSUI & COMPANY (USA), INC.; MITSUI MINING COMPANY, LTD.; MITSUI MINING USA INC; MITSUBISHI CORPORATION, a corporation; MITSUBISHI CORPORATION; MITSUBISHI HEAVY INDUSTRIES AMERICA INC., a corporation; MITSUBISHI HEAVY INDUSTRIES, LTD., a corporation,

Defendants-Appellees.

No. 01-17252

D.C. No.
CV-00-04277-VRW

H. JOSEPH TERRENCE, aka Joseph E. Terfansky; FRANKLIN D. GROSS; FREDERICK M. FULLERTON, JR.; ERMA L. WEIMER,
Plaintiffs-Appellants,

v.

MITSUI & CO., LTD., a Japanese business corporation aka Mitsui Bussan Kaisha; MITSUI & COMPANY (USA), INC., a business association; MITSUI MINING USA INC, a business association; MITSUBISHI CORPORATION, a Japanese business association; MITSUBISHI MATERIALS CORPORATION, a Japanese business association; MITSUBISHI HEAVY INDUSTRIES, LTD., a Japanese business association; MITSUBISHI MATERIALS USA CORPORATION, a business association; MITSUBISHI CORPORATION, a business association; MITSUBISHI HEAVY INDUSTRIES AMERICA, INC., a business association,
Defendants-Appellees.

No. 01-17260

D.C. No. CV-00-03648-VRW

ARTHUR TITHERINGTON; HENRY GEORGE BLACKHAM; FERGUS DUNSMORE MCGHIE, on behalf of themselves and others similarly situated,
Plaintiffs-Appellants,

v.

No. 01-17265

D.C. No. CV-00-02689-VRW

JAPAN ENERGY CORP, a Japanese business association; JAPAN ENERGY USA, a Delaware Corporation; IRVINE SCIENTIFIC SALES, a California Corporation
Defendants-Appellees.

FINNIE B PRICE, On behalf of himself and all others similarly situated,
Plaintiffs-Appellants,

v.

MITSUBISHI CORPORATION; MITSUBISHI HEAVY INDUSTRIES, LTD., a corporation; MITSUBISHI HEAVY INDUSTRIES AMERICA INC.; MITSUBISHI INTERNATIONAL CORPORATION, a corporation; MITSUI & CO (USA) INC.; MITSUI & CO. LTD., a corporation; MITSUI MINING CO LTD; MITSUI MINING USA INC, a corporation,
Defendants-Appellees.

No. 01-17499

D.C. No. CV-00-02761-VRW

ORDER AMENDING OPINION, DENYING PETITIONS FOR REHEARING AND REHEARING EN BANC, AND HOLDING MANDATE OPINION

Appeal from the United States District Court
for the Northern District of California
Vaughn R. Walker, District Judge, Presiding

Argued and Submitted
October 7, 2002 – Pasadena, California

Filed January 21, 2003
Amended March 6, 2003

Before: Stephen Reinhardt, Stephen S. Trott and Barry G. Silverman, Circuit Judges.

Opinion by Judge Reinhardt

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Margaret K. Pfeiffer, Sullivan & Cromwell, Washington DC, for defendants-appellees Nippon Steel U.S.A., Inc., Nippon Steel Corporation, Nippon Steel Trading America, Inc. and Nippon Steel Trading Co., Ltd.

Bruce E.H. Johnson, Davis, Wright, Tremaine, for defendants-appellees Mitsubishi Heavy Industries, Ltd. and Mitsubishi Heavy Industries America, Inc.

A. Victor Antola, Latham & Watkins, for defendants-appellees Kajima U.S.A., Inc., Kajima International, Inc., Kajima Engineering and Construction, Inc., Kajima

Development Corporation and Kajima Construction Services, Inc.

Lloyd W. Aubry, Jr., Morrison & Foerster, LLP, for defendants-appellees Ishikawajima-Harima Heavy Industries Co., Ltd. and IHI, Inc.

Cynthia S. Papsdorf and Sheri M. Schwartz, Kelley Drye & Warren LLP, Los Angeles, California; Bud G. Holman, Esq., Kelley Drye & Warren LLP, New York, New York, for defendants-appellees The Turner Corporation and Kitchell Corporation.

Catherine Z. Ysrael, Supervising Deputy Attorney General, State of California; Bill Lockyer, Attorney General of California; Manuel M. Medeiros, Solicitor General of California; Richard M. Frank, Chief Assistant Attorney General; Louis Verdugo, Jr. and Angela Sierra; For the State of California as amicus curiae in support of plaintiff-appellants.

Douglas Hallward-Driemeier, Department of Justice, Civil Division, appellate Staff; Robert D. McCallum, Assistant Attorney General; John S. Gordon, United States Attorney; David W. Shapiro, United States Attorney; Mark B. Stern, Civil Division, appellate Staff; James G. Hergen and Lara A. Ballard, Department of State, Office of the Legal Adviser; For the United States as amicus curiae in support of defendants-appellees.

ORDER

The opinion filed January 21, 2003 is hereby amended as follows:

1. Slip op. at 991, second full paragraph, line 6, after "because a state is," insert "generally."

2. Slip op. at 991, replace the last sentence (beginning "Because section 354.6 is substantive law"), including footnote 4, with the following:

   Nevertheless, that distinction does not affect the outcome here. Our determination of the foreign affairs doctrine issue does not depend on our conclusion that section 354.6 is substantive law. Whether substantive or procedural, section 354.6 creates a special rule that applies only to a newly defined class of tort actions – actions brought by Second World War slave labor victims against the entities that enslaved them. This new rule profoundly alters the likelihood that such actions will succeed, by not only extending the statute of limitations for claims that were timely when the statute took effect (although we doubt that any such claims existed), but, far more important, by reviving claims that were already time-barred. In the latter instance, the statute upset the repose of potential defendants. Such a revival of liability – even civil liability – is troubling and raises serious due process questions. We need not address those questions here, however. The important point for our foreign affairs analysis is that the California legislature created – or at least resurrected – a special class of tort actions, with the aim of rectifying wartime wrongs committed by our enemies or by parties operating under our enemies' protection.

3. Immediately following the passage inserted above (after "under our enemies' protection")

add a new footnote containing the following text:

> Two decisions of the California Court of Appeal, one by the Second Appellate District and one by the Fourth, have recently addressed whether section 354.6 is substantive or procedural in nature. The decisions reached opposite conclusions. *Compare Mitsubishi Materials Corp. v. Superior Court,* No. G030056, slip op. at 2 (Cal. Ct. App. Feb. 6, 2003) ("The legislation actually *creates* a state law claim which otherwise would not exist. . . . ") *with Taiheiyo Cement Corp. v. Superior Court,* No. B155736, slip op. at 24 (Cal. Ct. App. Jan. 15, 2003) ("The sole purpose of section 354.6 is to extend the statute of limitations for common law claims for unpaid labor and personal injuries arising out of slave or forced labor."). Both decisions were issued after our opinion was sent to the Clerk for filing.

4. Slip op. at 1005, replace the first full paragraph with the following:

> Section 354.6 runs afoul of the restriction on the exercise of foreign affairs powers by the states. Because California lacks the power to create a right of action – or, alternatively, to resurrect time-barred claims – in order to provide its own remedy for war-related injuries inflicted by our former enemies and those who operated in their territories, we hold that section 354.6 is unconstitutional.

With these amendments, the panel has voted unanimously to deny the petitions for rehearing and rehearing en banc. The full court has been advised of the petitions

for rehearing en banc, and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R.App. P. 35. The petitions for rehearing and rehearing en banc are denied.

The mandate will be held pending a decision in *American Insurance Association v. Low,* 123 S. Ct. 817 (2003) (No. 02-722) (granting certiorari).

OPINION

REINHARDT, Circuit Judge:

Plaintiffs-Appellants in these consolidated cases allege that they were forced to work as slave laborers for German and Japanese corporations during the Second World War. They seek damages and other remedies for lost wages and for other atrocious injuries they suffered in the course of their forced labor. Defendants-Appellees are corporations (or successors or affiliates of those corporations) that allegedly committed these atrocities.

A California statute passed in 1999 creates a cause of action against such defendants for claims involving Second World War slave labor.[1] Cal. Code Civ. Proc. § 354.6. Under the statute, these claims are not time-barred if commenced on or before December 31, 2010. *Id.* Although Appellants assert a variety of statutory and common law claims for relief, all raise section 354.6 as the primary basis for

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[1] Although the statute distinguishes between "slave laborers," *see* Cal. Code Civ. Proc. § 354.6(a)(1), and "forced laborers," *see* § 354.6(a)(2), the distinction is generally immaterial to the analysis in this opinion. We generally use the term "slave laborer" to refer to both categories of workers.

bringing their suits so many years after the alleged wrongs were committed. Reluctantly, we hold that section 354.6 is invalid under the United States Constitution and that in its absence Appellants' remaining claims are time-barred.

Background

These cases concern the terrible abuses that German and Japanese corporate interests inflicted both on civilians and on soldiers captured by German and Japanese military forces during the Second World War. The corporations and their managers, with the cooperation and encouragement of their governments, subjected many individuals to vicious cruelties and forced them to work long hours without pay. The slave workers were often underfed, physically beaten, exposed to dangerous conditions, and denied medical care; many were murdered, and others died as a result of the maltreatment they suffered. Among these slave laborers were, tragically, many who became victims of the Holocaust, the most atrocious act ever perpetrated by a civilized (or uncivilized) people, an act unparalleled in history. Indeed, the Holocaust represents the worst historic manifestation of the perpetual human condition known as antisemitism, a phenomenon that is still thriving in all too many parts of the world today.[2]

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[2] It is plainly Holocaust survivors who are the intended beneficiaries of section 354.6, which speaks of "concentration camp[s]" and "ghettos[s]," [sic] mentions no power by name other than the "Nazi regime," and never employs the term "Axis Powers," which is the usual collective term for the enemies of the Allied Powers. Ironically, among the hundreds of thousands of plaintiffs in the cases before us, there is only one Holocaust survivor. All the other plaintiffs suffered their

(Continued on following page)

I. The Cases

A. *Deutsch v. Turner*

The suit by Appellant Josef Tibor Deutsch ("Deutsch") is the only action before us concerning wrongs committed by German rather than Japanese corporations and the only action that was not consolidated with other cases by the district court. It is, in other words, the only Holocaust case at issue here, and it, unlike most of the Japanese cases, involves only a single plaintiff.

Currently a resident of California, Deutsch, a Jew, was born and raised in Hungary. Deutsch asserts that, in 1944, when he was a child, the Nazis took over his town and transported him and his brother Georg to Auschwitz. There the brothers were tortured and forced to work as slaves for 14-hour days, seven days a week. Their work was for the benefit of private corporations, which entered into agreements with the Nazi government, whereby they paid the Nazis less than the prevailing wage for the work of the slaves. The corporations for which the Deutsch children labored included Appellee Hochtief AG ("Hochtief"), one of Germany's largest and oldest construction companies. A civilian employee of Hochtief overseeing the slave laborers in their work for Hochtief beat Deutsch's brother Georg. Georg ultimately died from his injuries. By a stroke of good fortune, Deutsch, unlike most of his co-religionists, survived.

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injuries in Asia at the hands of Japanese companies. Whatever the intended purpose of the California statute, the text of section 354.6 appears to be broad enough to encompass all the plaintiffs' claims, and not just those of the one Holocaust survivor. We follow the district court and all the parties before us in assuming that such is the case.

On April 7, 2000, Deutsch filed a complaint in the Superior Court of California against Hochtief, its wholly owned subsidiary the Turner Corporation, a Delaware corporation, and the Kitchell Corporation, an Arizona corporation that Hochtief owns in part. Deutsch alleged intentional infliction of emotional distress, unlawful business practices under the California Business and Professions Code, quantum meruit, and wrongful death. The action was removed to federal court on the ground of diversity jurisdiction.

Deutsch's basis for bringing the action so long after the alleged acts is section 354.6 of the California Code of Civil Procedure, which confers jurisdiction on the Superior Court to hear claims by "[a]ny Second World War slave labor victim" or "Second World War forced labor victim," or their heirs, against "any entity or successor in interest thereof, for whom that labor was performed, either directly or through a subsidiary or affiliate." Cal. Code Civ. Proc. § 354.6(b). Section 354.6 permits such actions to be brought on or before December 31, 2010, regardless of any otherwise applicable statute of limitations. § 354.6(c).

The district court dismissed the action as presenting a nonjusticiable political question. *Deutsch v. Turner,* No. CV 00-4405 (C.D. Cal. Aug. 25, 2000).

B. *In re World War II Era Japanese Forced Labor Litigation*

The consolidated appeal before us also involves 28 other suits, all by victims and heirs of victims against Japanese business entities. Some were brought as class actions. Because there are so many complaints, and because the precise factual allegations do not bear on our decision, we do

not here recount the details of the injuries that the various Appellants endured. Unlike Deutsch, these individuals – some civilians, some soldiers who were prisoners of war – were not selected because of their religious affiliation and were not victims of an overall plan to exterminate an ethnic or religious group. Rather, they became subject to the Japanese slave labor program either because they opposed the Japanese war efforts, in one capacity or another, or simply because they were in the wrong place at the wrong time. In any event, they were all subjected to serious mistreatment, including starvation, beatings, physical and mental torture, being transported in unventilated cargo holds of ships, and being forced to make long marches under a tropical sun without water. Some survived, while others were ultimately executed, or died from disease or physical abuse.

Twenty-seven of the suits against the Japanese corporate interests were originally brought in California Superior Court, while one was initiated in the United States District Court for the Central District of California. The claimants demanded damages and other relief, raising claims under California Code of Civil Procedure section 354.6, and alleging, variously, assault and battery, unjust enrichment, conspiracy, false imprisonment, intentional infliction of emotional distress, conversion, quantum meruit, unfair business practices under California Business and Professions Code sections 17200 *et seq.,* involuntary servitude under California Penal Code section 181 and Article I, § 6 of the California Constitution, and violations of international law under the Alien Tort Claims Act, 28 U.S.C. § 1350. As defendants they name both Japanese corporations that they allege committed the injuries and successors and affiliates of those corporations. The suits filed in state court were removed to federal court; all were then consolidated in

the Northern District of California. The district court denied motions to remand and dismissed all claims.

Appellants in the majority of the Japanese cases were, at the time of the occurrences that form the basis for these lawsuits, nationals of the United States or of other Allied nations. Many were in military service and were taken as prisoners of war. The district judge dismissed these cases on the ground that they were barred by a provision of the Treaty of Peace ending the war between the Allied Powers and Japan.[3] *In re World War II Era Japanese Forced Labor Litig.*, 114 F. Supp. 2d 939, 944-49 (N.D. Cal. 2000) (*Forced Labor (Allied I)*); *In re World War II Era Japanese Forced Labor Litig.*, No. MDL-1347 (N.D. Cal. Feb. 8, 2001) (*Forced Labor (Allied II)*); *In re World War II Era Japanese Forced Labor Litig.*, 164 F. Supp. 2d 1153, 1157 (N.D. Cal. 2001) (*Forced Labor (Filipinos)*).

Appellants in the remaining cases were Korean and Chinese nationals. The district court held that their claims were not affected by the Treaty of Peace between the Allies

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[3] The provision that had this effect is Article 14(b), which provides as follows:

> Except as otherwise provided in the present Treaty, the Allied Powers waive all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war, and claims of the Allied Powers for direct military costs of occupation.

Treaty of Peace with Japan, Sept. 8, 1951, art. 14(b), 3 U.S.T. 3169, T.I.A.S. No. 2490. The district court held that claims by Allied nationals against Japanese corporations were barred under the clause waiving "other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war." *Forced Labor (Allied I)*, 114 F. Supp. 2d at 944-49 (N.D. Cal. 2000).

and Japan, because these claimants were not Allied nationals or nationals of any signatory of that treaty. *In re World War II Era Japanese Forced Labor Litig.*, 164 F. Supp. 2d 1160, 1165-68 (N.D. Cal. 2001) (*Forced Labor (Koreans)*). The court dismissed these cases nonetheless, on the grounds that section 354.6 was an unconstitutional intrusion on the foreign affairs powers of the United States, and that the remaining claims were time-barred. *Id.* at 1168-78.

II. Constitutionality of Section 354.6 Under Foreign Affairs Doctrine

A. Section 354.6 and Its Effect

All Appellants rely on section 354.6 of the California Code of Civil Procedure. Because it can best be understood when read as a whole, we quote it in full:

> § 354.6.
>
> (a) As used in this section:
>
> (1) "Second World War slave labor victim" means any person taken from a concentration camp or ghetto or diverted from transportation to a concentration camp or from a ghetto to perform labor without pay for any period of time between 1929 and 1945, by the Nazi regime, its allies and sympathizers, or enterprises transacting business in any of the areas occupied by or under control of the Nazi regime or its allies and sympathizers.
>
> (2) "Second World War forced labor victim" means any person who was a member of the civilian population conquered by the Nazi regime, its allies or sympathizers,

or prisoner-of-war of the Nazi regime, its allies or sympathizers, forced to perform labor without pay for any period of time between 1929 and 1945, by the Nazi regime, its allies and sympathizers, or enterprises transacting business in any of the areas occupied by or under control of the Nazi regime or its allies and sympathizers.

(3) "Compensation" means the present value of wages and benefits that individuals should have been paid and damages for injuries sustained in connection with the labor performed. Present value shall be calculated on the basis of the market value of the services at the time they were performed, plus interest from the time the services were performed, compounded annually to date of full payment without diminution for wartime or postwar currency devaluation.

(b) Any Second World War slave labor victim, or heir of a Second World War slave labor victim, Second World War forced labor victim, or heir of a Second World War forced labor victim, may bring an action to recover compensation for labor performed as a Second World War slave labor victim or Second World War forced labor victim from any entity or successor in interest thereof, for whom that labor was performed, either directly or through a subsidiary or affiliate. That action may be brought in a superior court of this state, which court shall have jurisdiction over that action until its completion or resolution.

(c) Any action brought under this section shall not be dismissed for failure to comply with the applicable statute of limitation, if the action is commenced on or before December 31, 2010.

Appellants and the State of California as amicus seek to characterize section 354.6 as a purely procedural measure by reducing its scope to the provision regarding the limitations, as set forth in subsection (c). The entire effect of section 354.6, they argue, is to extend the statute of limitations for claims that are already available to remedy Nazi-era slave labor. They cite an impressive range of possible sources of substantive law prohibiting slave labor, including state statutes and common law, the United States Constitution, and international law. The reference in subsection (c) to "the applicable statute of limitations" supports their interpretation: If a statute of limitations is already "applicable," perhaps it is because subsection (c) contemplates a pre-existing cause of action, rather than a cause of action created under section 354.6.

However, section 354.6 can be viewed as purely procedural only when subsection (c) is viewed in isolation from the rest of the provision. Most important, the first sentence of subsection (b) explicitly creates a cause of action by providing that certain individuals "may bring an action" for certain wrongs. *See Verizon Md. Inc. v. Pub. Serv. Comm'n,* 535 U.S. 635, ___, 122 S. Ct. 1753, 1759 (2002) (noting that language in a statute providing that party "may bring an action" "reads like the conferral of a private right of action"). Appellants' recitation of pre-existing causes of action for slave labor, whether under other statutes or other bodies of law, is therefore fruitless. Regardless of any pre-existing law, the California legislature chose to create a specific cause of action for persons subjected to slave labor by the Nazis and their allies and sympathizers. If confirmation of this reading is required, it is found in those passages of section 354.6 that set forth the details of the new cause of action. The section defines

the class of plaintiffs who may sue under that cause of action, *see* § 354.6(a)(1), (2), sets the method for measuring damages, *see* § 354.6(a)(3), and establishes a special rule regarding liability of corporations affiliated with the wrongdoer, *see* § 354.6(b). Even the language of the statute of limitations provision itself limits the application of the statute of limitations to "action[s] brought under this section," thus confirming that section 354.6 creates a cause of action.

Appellants' only remaining argument for the procedural nature of section 354.6 is its placement within the Code of Civil Procedure, in Title Two: Time of Commencing Civil Actions. However, where the meaning of a statutory provision is clear, we do not rely upon the location the legislature chose for it in its system of codification, *see Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.*, 111 F.3d 1322, 1328 (7th Cir. 1997), just as we do not rely upon the headings and titles of sections in such circumstances. *Brotherhood of R.R. Trainmen v. Baltimore & Ohio R.R.*, 331 U.S. 519, 528-29 (1947). The reason for the placement of section 354.6 within the procedural code is, in any event, not difficult to explain: The most striking aspect of the section is, indeed, its statute of limitations, which would allow the commencement of a suit more than 60 years after the occurrence of the injury. *Id.* Section 354.6's placement, therefore, does not change our view that the section is substantive in nature.

The parties debate whether section 354.6 is substantive or procedural primarily in the context of the Appellees' due process challenge, which we do not address. The substantive nature of the provision, however, is relevant also to the foreign affairs doctrine analysis in which we engage below, because a state is generally more likely to

exceed the limits of its power when it seeks to alter or create rights and obligations than when it seeks merely to further enforcement of already existing rights and duties. Nevertheless, that distinction does not affect the outcome here. Our determination of the foreign affairs doctrine issue does not depend on our conclusion that section 354.6 is substantive law. Whether substantive or procedural, section 354.6 creates a special rule that applies only to a newly defined class of tort actions – actions brought by Second World War slave labor victims against the entities that enslaved them. This new rule profoundly alters the likelihood that such actions will succeed, by not only extending the statute of limitations for claims that were timely when the statute took effect (although we doubt that any such claims existed), but, far more important, by reviving claims that were already time-barred. In the latter instance, the statute upset the repose of potential defendants. Such a revival of liability – even civil liability – is troubling and raises serious due process questions. We need not address those questions here, however. The important point for our foreign affairs analysis is that the California legislature created – or at least resurrected – a special class of tort actions, with the aim of rectifying wartime wrongs committed by our enemies or by parties operating under our enemies' protection.[4]

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[4] Two decisions of the California Court of Appeal, one by the Second Appellate District and one by the Fourth, have recently addressed whether section 354.6 is substantive or procedural in nature. The decisions reached opposite conclusions. *Compare Mitsubishi Materials Corp. v. Superior Court*, No. G030056, slip op. at 2 (Cal. Ct. App. Feb. 6, 2003) ("The legislation actually *creates* a state law claim which otherwise would not exist. . . . ") *with Taiheiyo Cement Corp. v.*

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B. Foreign Affairs Doctrine Analysis

Appellees argue that section 354.6 exceeds California's power to engage in foreign affairs. We agree.[5]

The Constitution does not create an express, general power over foreign affairs but rather allocates particular powers related to foreign affairs to particular federal actors. It appoints the President as "Commander in Chief of the Army and Navy of the United States," U.S. Const., art. II, § 2, cl. 1, and authorizes him to "make Treaties, provided two thirds of the Senators present concur," to "appoint Ambassadors" with the "Advice and Consent of the Senate," *id.* cl. 2, and to "receive Ambassadors and other public Ministers," *id.* § 3. It grants to Congress the power to "lay and collect . . . Duties, Imposts, and Excises," to "provide for the common Defence," *id.* art. I, § 8, cl. 1, to "regulate Commerce with foreign Nations," *id.* art. I, § 8, cl. 3, to "establish an uniform Rule of Naturalization," *id.* cl. 4, to "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations," *id.* cl. 10, to "declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water," *id.* cl. 11, to "raise and support Armies," *id.* cl. 12, to "provide and maintain a Navy," *id.* cl. 13, and to regulate "the land and naval forces," *id.* cl. 14.

Superior Court, No. B155736, slip op. at 24 (Cal. Ct. App. Jan. 15, 2003) ("The sole purpose of section 354.6 is to extend the statute of limitations for common law claims for unpaid labor and personal injuries arising out of slave or forced labor."). Both decisions were issued after our opinion was sent to the Clerk for filing.

[5] Some Appellants assert that federal jurisdiction is lacking over their claims. We address that issue below.

While the Constitution allocates these foreign affairs powers specifically to the federal government, it also expressly prohibits the states from exercising certain foreign relations powers, including both some of those expressly allocated to the federal government and a few others. "No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal" or, without consent of Congress, "lay any Imposts or Duties on Imports or Exports," "keep Troops or Ships of War in time of Peace," "enter into any Agreement or Compact . . . with a foreign Power," or "engage in War, unless actually invaded." *Id.* § 10.

Because the Constitution mentions no general foreign affairs power, and because only a few specified powers related to foreign affairs are expressly denied the states, one might assume that, with certain exceptions, states are free to pursue their own foreign policies. This is not, however, the case. To the contrary, the Supreme Court has long viewed the foreign affairs powers specified in the text of the Constitution as reflections of a generally applicable constitutional principle that power over foreign affairs is reserved to the federal government. The Court has sometimes expressed this principle in expansive terms, declaring, for example, that "[p]ower over external affairs is not shared by the States; it is vested in the national government exclusively." *United States v. Pink,* 315 U.S. 203, 233 (1942); *see also Chae Chan Ping v. United States,* 130 U.S. 581, 606 (1889) (*The Chinese Exclusion Case*) ("For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.").

The implication of the general principle is that "even in [the] absence of a treaty" or federal statute, a state may violate the constitution by "establish[ing] its own foreign

policy." *Zschernig v. Miller,* 389 U.S. 429, 441 (1968).[6] *Zschernig* concerned an Oregon statute that provided for escheat of estate property claimed by a nonresident alien unless United States citizens had reciprocal rights in the country of the alien's residence and foreign heirs in that country would have the right to receive the proceeds of Oregon estates without confiscation. *Id.* at 430-31. The Court held that, while a reciprocity statute of this sort was not facially invalid, probate courts applying it impermissibly relied on

> inquiries into the type of governments that obtain in particular foreign nations – whether aliens under their law have enforceable rights, whether the so-called "rights" are merely dispensations turning upon the whim or caprice of government officials, whether the representation of consuls, ambassadors, and other representatives of foreign nations is credible or made in good faith, whether there is in the actual administration in the particular foreign system of law any element of confiscation.

Id. at 434. In short, the Court found that the application of the statute depended less on an evaluation of the stated law of a particular country than on whether that country's political system was legitimate in the view of the Oregon courts. *See id.* at 440 (noting that state courts had held that communist and fascist countries did not grant rights reciprocal to those of Oregonians). To condition the application of

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[6] The doctrine has been referred to as "dormant foreign affairs preemption," or simply as "the foreign affairs power." *See Gerling Global Reinsurance Corp. of Am. v. Low,* 240 F.3d 739, 751 n.9 (9th Cir. 2001) (internal quotation marks removed), *cert. granted sub nom. Am. Ins. Ass'n v. Low,* 71 U.S.L.W. 3373 (2003).

state law on the political system of a foreign country was "an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress." *Id.* at 432.

Despite the broad language of *Pink* and the *Chinese Exclusion Case*, however, *Zschernig* is "[t]he only case in which the Supreme Court has struck down a state statute as violative of the foreign affairs power." *Int'l Ass'n of Indep. Tanker Owners v. Locke*, 148 F.3d 1053, 1069 (9th Cir. 1998), *rev'd in part on other grounds sub nom. United States v. Locke*, 529 U.S. 89 (2000). *Zschernig* has been applied sparingly, because the Supreme Court has held that a statute does not violate the constitution where it merely has "some incidental or indirect effect in foreign countries." *Clark v. Allen*, 331 U.S. 503, 517 (1947) (upholding facially a statute similar to that subsequently struck as applied in *Zschernig*).[7]

Noting that "the federal government's foreign affairs power. . . . is rarely invoked by the courts," we have declined to invalidate under *Zschernig* a California statute with certain superficial similarities to section 354.6.

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[7] Other courts have, however, invalidated statutes under foreign affairs doctrine. *See, e.g., Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 49-61 (1st Cir.1999) (invalidating Massachusetts law restricting ability of Massachusetts and its agencies to purchase goods or services from individuals or companies engaged in business with Burma), *aff'd on other grounds sub nom. Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 120 S.Ct. 2288, 147 L.Ed.2d 352 (2000); *Springfield Rare Coin Galleries, Inc. v. Johnson*, 115 Ill.2d 221, 236-37, 104 Ill.Dec. 743, 503 N.E.2d 300 (1986) (invalidating state statute excluding South African coins from otherwise generally applicable state tax exemptions).

Gerling Global Reinsurance Corp. of Am. v. Low, 240 F.3d 739, 752 (9th Cir. 2001), *cert. granted sub nom. Am. Ins. Ass'n v. Low,* 71 U.S.L.W. 3373 (2003). *Gerling* concerned California's Holocaust Victim Insurance Relief Act, Cal. Ins.Code §§ 13800-13807 ("HVIRA"), which requires insurers doing business in California to file certain information about any insurance policies that they or companies "related" to them sold in Europe and that were in effect between 1920 and 1945. *Id.; see Gerling,* 240 F.3d at 743, 753. While recognizing that HVIRA involved foreign affairs, we held that it was constitutional because of the combination of two factors: first, "HVIRA, on its face, involves commerce alone" – and thus should be considered under the Supreme Court's foreign commerce cases rather than under the foreign affairs cases; and second, HVIRA "is not, on its face, directed at any particular foreign country" – and thus is comparatively unlikely to interfere with the foreign relations of the federal government. *Id.* at 753.

While *Gerling* shows that the general prohibition against state involvement with external affairs is not as broad as some judicial statements would imply, it also suggests a mode of analysis that is relevant to the cases before us. In particular, *Gerling* distinguishes among statutes according to the foreign affairs functions that they implicate. *Gerling* suggests that statutes that "mainly involve foreign commerce" are among those least likely to be held invalid under the foreign affairs power. *Id.* The regulation of commerce is simply not central to the foreign affairs power that is off limits to states.[8] For present

[8] State regulation of foreign commerce might, however, exceed constitutional limitations under other constitutional doctrines. *See, e.g.,*

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purposes, we must consider the importance to foreign affairs analysis of another subset of foreign affairs powers: the power of the federal government to make and to resolve war, including the power to establish the procedure for resolving war claims.

While neither the Constitution nor the courts have defined the precise scope of the foreign relations power that is denied to the states, it is clear that matters concerning war are part of the inner core of this power. Of the eleven clauses of the Constitution granting foreign affairs powers to the President and Congress, *see supra,* seven concern preparing for war, declaring war, waging war, or settling war.[9] Most of the Constitution's express limitations on states' foreign affairs powers also concern war.[10] Even those foreign affairs powers in the Constitution that do not expressly concern war and its resolution may be understood, in part, as a design to *prevent* war. Indeed, as the *Federalist* shows, supporters of the new Constitution

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Barclays Bank PLC v. Franchise Tax Bd., 512 U.S. 298, 328 (1994) (considering whether state's international tax reporting system violated either dormant commerce clause or federal government's ability to speak in "one voice.")

[9] *See* U.S. Const., art. II, § 2, cl. 1 (making President Commander in Chief); *id.* cl. 2; (authorizing President to make treaties with advice and consent of Senate); *id.* art. I, § 8, cl. 1 (authorizing Congress to "provide for the common Defence"); *id.* cl. 11 (authorizing Congress to declare war); *id.* cl. 12 (authorizing Congress to raise and support armies); *id.* cl. 13 (authorizing Congress to "provide and maintain a Navy"); *id.* cl. 14 (authorizing Congress to regulate "the land and naval forces").

[10] *See id.* § 10 (prohibiting states from entering "any Treaty, Alliance, or Confederation," or, without congressional authorization, from "keep[ing] Troops or Ships of War in time of Peace" and from "engag[ing] in War, unless actually invaded.")

believed that disunity in international affairs risked unnecessary war. *See, e.g.*, THE FEDERALIST, NO. 3, at 13 (Clinton Rossiter ed., 1961) ("[F]ewer just causes of war will be given by the national government, [and] it will also be more in their power to accommodate and settle them amicably."). The Supreme Court cases under the foreign affairs power have also been driven, in part, by this concern. Thus the inheritance provision at issue in *Zschernig*, although superficially unrelated to war, was seen by a Court operating at the height of the Cold War as a potential provocation to foreign powers. " 'Experience has shown,' " the Court wrote in striking the provision, " 'that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government.' " 389 U.S. at 441 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 64 (1941)). Matters related to war are for the federal government alone to address.

Among the six district court decisions we review here, the only one to reach the foreign affairs challenge to section 354.6 held that the provision was unconstitutional under that doctrine for six reasons:

> (1) the terms of section 354.6 and its legislative history demonstrate a purpose to influence foreign affairs directly, (2) the statute targets particular countries, (3) the statute does not regulate an area that Congress has expressly delegated to states to regulate, (4) the statute establishes a judicial forum for negative commentary about the Japanese government and Japanese companies, (5) the Japanese government asserts that litigation of these claims could complicate and impede diplomatic relationships of the countries involved, and (6) the United

> States, through the State Department, contends that section 354.6 impermissibly intrudes upon the foreign affairs power of the federal government.

Forced Labor (Koreans), 164 F. Supp. 2d at 1173. Although we agree that section 354.6 violates the foreign affairs power, we base our holding on a narrower consideration. We hold that section 354.6 is impermissible because it intrudes on the federal government's exclusive power to make and resolve war, including the procedure for resolving war claims.

With section 354.6, California seeks to redress wrongs committed in the course of the Second World War. By its terms, only "Second World War slave labor victims" and "Second World War forced labor victims" can bring suit under the provision. § 354.6(b). The wrong-doers under the statute – the enslaving individuals or entities – include "the Nazi regime, its allies and sympathizers, or enterprises transacting business in any of the areas occupied by or under control of the Nazi regime or its allies or sympathizers." § 354.6(a)(1), (2). The governmental entities are, by definition, wartime enemies of the United States, while the "enterprises" identified in the provision, if not themselves our wartime enemies, were operating in enemy territory and presumably – no party disputes this – with the consent and for the benefit of our wartime enemy. Wrongs committed after the end of the war are not cognizable under section 354.6; the provision concerns only acts that took place during the years leading up to the war and during the years of the war itself. *Id.* In short, California has sought to create its own resolution to a major issue arising out of the war – a remedy for wartime acts that California's legislature believed had never been fairly resolved.

The United States has already exercised its own exclusive authority to resolve the war, including claims

arising out of it. It did not choose, however, to incorporate into that resolution a private right of action against our wartime enemies or their nationals. The United States resolved the war against Germany by becoming a party to a number of treaties and international agreements, beginning with the 1945 agreements at Yalta and Potsdam, in which the United States, Britain, and the Soviet Union agreed to extract reparations from Germany and its nationals but did not include a private right of action against either. *See* Protocol of the Proceedings, Berlin (Potsdam) Conference, Aug. 2, 1945, art. (B)(111), 3 Bevans 1207. Subsequent agreements also failed to create a private right of action, including the Paris Reparations Treaty of 1946 between the United States and 17 other nations, Agreement on Reparations From Germany, Jan. 14, 1946, 61 Stat. 3157, T.I.A.S. 1655 ("Paris Reparations Treaty"); the Transition Agreement of 1952 between the Western Powers and the Federal Republic of Germany, Convention Between the United Kingdom of Great Britain and Northern Ireland, France, the United States of America and the Federal Republic of Germany on the Settlement of Matters Arising Out of the War and the Occupation, May 26, 1952 (as amended by Schedule IV to the Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany, Oct. 23, 1954), 6 U.S.T. 4117, 331 U.N.T.S. 219; the London Debt Agreement of 1953 between the United States and 20 other nations, Agreement on German External Debts, Feb. 27, 1953, 4 U.S.T. 443, 333 U.N.T.S. 3; and the Two-Plus-Four Treaty, which reunified Germany and became effective on

March 15, 1991, Treaty on the Final Settlement with Respect to Germany, Sept. 12, 1990, 29 I.L.M. 1186.[11] Most recently, the Foundation Agreement of July 17, 2000, an executive agreement between the governments of Germany and the United States, provided a limited form of remedy for claimants such as Deutsch. Agreement Between the Government of the United States of America and the Government of the Federal Republic of Germany Concerning the Foundation "Remembrance, Responsibility and the Future." The Foundation was created by Germany, in negotiation with the United States, five Central and Eastern European countries, Israel, and the non-governmental Conference on Jewish Material Claims Against Germany,

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[11] For useful and accessible surveys of these agreements as they apply to war reparations, see *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 448-56 (D.N.J. 1999), and *Burger-Fischer v. DeGussa AG*, 65 F. Supp. 2d 248, 265-73 (D.N.J. 1999). The district court in *Deutsch* relied heavily on these cases and adopted their conclusion that Deutsch's claim raised a nonjusticiable political question, *Deutsch*, No. CV 00-4405, at 2-6, a conclusion with which we disagree. The district court determined that the postwar agreements created the exclusive remedy to the matters raised by Deutsch, and that to order relief would therefore require the court to interfere with the foreign affairs choices of the political branches. *Id.* Under political question doctrine, the court noted, it is impermissible for a court to make policy related to foreign affairs. *Id.* at 2 (citing *Baker v. Carr*, 369 U.S. 186, 211 (1962)). Therefore, the district court supposed, *Deutsch* raised a nonjusticiable political question. The problem with this argument is that it makes every dispute over the proper application of a treaty into a political question, because treaties inherently involve foreign affairs. No political question, however, is raised by the simple application of the requirements of a treaty to which the United States is a party. Treaties have the force of law, *see Missouri v. Holland*, 252 U.S. 416 (1920), and, if they are self-executing or have been implemented through legislation, must be applied by the courts. *See United States v. Alvarez-Machain*, 504 U.S. 655, 667 (1992).

for the purpose of making payments to people who suffered at the hands of German companies during the Nazi Era. It provides for payment of up to 15,000 German Marks (roughly $7500) to individual claimants who were subjected to forced labor. *See id.* at Annex A. We do not have the authority to consider the adequacy of such payments here. Indeed, we acknowledge that no possible compensation could be sufficient to remedy the harm done to Holocaust victims and their families.

No party argues that any of these agreements provides the authority for a state of the United States to create a private right of action enabling individuals to recover for wartime injuries against German corporations. Deutsch argues, however, that the terms of these various agreements do not *prohibit* a state from creating such a right of action, and that in the absence of such a prohibition, his action may proceed. Deutsch's argument cannot carry the day. As we explained earlier, the Constitution allocates the power over foreign affairs to the federal government exclusively, and the power to make and resolve war, including the authority to resolve war claims, is central to the foreign affairs power in the constitutional design. In the absence of some specific action that constitutes authorization on the part of the federal government, states are prohibited from exercising foreign affairs powers, including modifying the federal government's resolution of war-related disputes.

The war with Japan ended with the Treaty of Peace, signed in San Francisco, on September 8, 1951, by the representatives of the United States and 47 other Allied powers and Japan, and ratified by the United States Senate on April 28, 1952. Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169, T.I.A.S. No. 2490. Although

the parties dispute whether that treaty by its own terms precludes the claims brought by any of the Appellants,[12] that is the only dispute regarding the treaty. No party asserts that the treaty either creates – explicitly or implicitly – a private right of action against Japan or its nationals, or authorizes states of the United States to create such a right.[13] Once again, without such authorization,

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[12] The central disagreement concerns the meaning of Article 14(b) of the treaty, which is quoted in full *supra* note 3. The district judge held that Appellants' claims were waived because they are claims of Allied nationals "arising out of actions taken by [Japanese] nationals in the course of the prosecution of the war." *Id.; Forced Labor (Allied I),* 114 F. Supp. 2d at 944-49. Appellants argue that the actions of the Appellee corporations were not taken "in the course of the prosecution of the war," or that it is an issue of fact whether they were or not.

[13] Appellants do assert that, if Article 14 of the treaty waives claims against Japanese nationals, as Appellees assert, then Article 14 is superceded by Article 26. Article 26 provides, in pertinent part:

> Should Japan make a peace settlement or war claims settlement with any State granting that State greater advantages than those provided by the present Treaty, the same advantages shall be extended to the parties to the present Treaty.

Treaty of Peace with Japan, at art. 26. Appellants argue that other foreign states have entered into agreements with Japan that do not waive private claims and that those agreements thereby extend to those foreign states "greater advantages" than the terms extended to the United States. The district court found that Article 26 confers rights only on the "parties" to the treaties, not on individuals. *Forced Labor (Allied I),* 114 F. Supp. 2d at 949. We agree, at least as to the right to invoke the clause. It is the prerogative of the United States, not of California or of Appellants, to determine whether a foreign state has been granted greater advantages and, if so, whether it is in the interest of the United States to incorporate those advantages (along with any concomitant lesser disadvantages) into the treaty. The United States has not invoked Article 26 to authorize a private right of action. Appellants' reliance on the article is, therefore, unavailing.

states lack the power to alter the federal government's resolution of disputes relating to the war.[14]

The grievances of at least one class of potential plaintiffs identified in section 354.6, prisoners of war, were addressed by the federal government in domestic legislation. *See* § 354.6(a)(2). Under the War Claims Act of 1948, 50 U.S.C. app. §§ 2001-2017p, assets seized from Germany, Japan, or their nationals within the United States and its territory were used to compensate American prisoners of war whose rights had been violated. *See* U.S. FOREIGN CLAIMS SETTLEMENT COMMISSION, SETTLEMENT OF CLAIMS BY THE FOREIGN CLAIMS SETTLEMENT COMMISSION FROM SEPTEMBER 14, 1949 TO MARCH 31, 1955, at 10-11 (1955); 50 U.S.C. app. § 2005(d)(2)(A). The Act required prisoners of war to submit their claims to a federal agency, whose decision was final; it conceived of no private right of action against German or Japanese entities. *See* 50 U.S.C. app. § 2010.

California was dissatisfied with how the federal government chose to address the various wartime injuries suffered by victims of the Nazis and their allies after the United States brought the Second World War to a close. The California legislature found that, under the treaties and compensatory programs that the federal government had established, "victims of Nazi persecution have been deprived of their entitlement to compensation for their

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[14] It is immaterial that many of the Appellants are nationals of two nations, China and Korea, that were not signatories of the San Francisco treaty. When the United States has been a party to a war, the resolution it establishes to that war is the resolution for the whole of the United States. States lack the power to modify that resolution, regardless of the citizenship of those seeking redress.

labor and for injuries sustained while performing that labor as forced or slave laborers prior to and during the Second World War." 1999 Cal. Stat. 216, § 1(b) (codified in notes to Cal. Code Civ. Proc. § 354.6). The state legislature therefore enacted section 354.6 to remedy these 54-year-old injuries in a manner favored by California but not provided for by the federal government. Appellants assert that no international agreement or other federal action prohibits California from doing so. However, as we have stated, because the issue is the lack of state power, it is immaterial whether the federal government enacted a prohibition. The federal government, acting under its foreign affairs authority, provided its own resolution to the war; California has no power to modify that resolution.[15]

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[15] One might argue that the Holocaust was distinct from the German war effort, that claims for injuries arising from the Holocaust do not, therefore, relate to the war, and that such injuries, because they are unrelated to the war, do not implicate the war powers of the federal government. We need not assume that the acts of enslavement encompassed by section 354.6 served military purposes or advanced the war effort of the Nazis or their allies. We simply note that, by its terms, section 354.6 creates a right of action only for "Second World War" slave labor victims. For the purposes of the provision, the California legislature explicitly defined the harms suffered by such victims as pertaining to the war. Moreover, the federal government's exclusive power to resolve the war necessarily includes an exclusive power to address the injuries that section 354.6 attempts to remedy. The treaties themselves confirm that the federal government regarded all wartime injuries as matters integral to peacemaking, regardless of the purpose or effect of the wrong-doer's acts. In the Paris Reparations Treaty, for example, the United States and the other signatories "agree[d] among themselves that their shares of reparation, as determined by the present Agreement, shall be regarded by each of them as covering all its claims and those of its nationals against the former German Government and its Agencies, of a governmental or private nature arising out of the war." Paris Reparations Treaty, Jan. 14, 1946, art. 2(A), 61 Stat. 3157, 3163;

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Before concluding our discussion of this issue, we must consider Appellants' most vigorous argument in favor of the constitutionality of section 354.6: that the provision "presents striking parallels" to HVIRA, the insurance reporting requirement that we upheld in *Gerling*. Appellants correctly note two points of similarity: first, like section 354.6, HVIRA is related to Nazi-era wrongs; second, as under section 354.6, at least as applied to the cases before us, the parties regulated by HVIRA are businesses. The similarity ends there, however. Unlike section 354.6, HVIRA does not attempt to require the affected businesses to compensate victims for past wrongs: Specifically, as we noted in *Gerling*, HVIRA does not impose obligations on "European insurance companies to pay or not to pay claims on European policies." *Gerling*, 240 F.3d at 745 (internal quotation marks removed). HVIRA, rather, is merely a reporting requirement and the only consequence of noncompliance is the inability to do business in California in the future. *Id.* Whereas section 354.6 seeks to provide a monetary remedy for decades-old wartime wrongs, HVIRA is a forward-looking regulatory statute.[16] In short, unlike section 354.6, HVIRA does not

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see also, e.g., Treaty of Peace with Hungary, Feb. 10, 1947, art. 30(4), 61 Stat. 2109, 2126 (bilateral treaty between Allied Powers and Hungary) ("Hungary waives on its own behalf and on behalf of Hungarian nationals all claims against Germany and German nationals outstanding on May 8, 1945, except those arising out of contracts and other obligations entered into, and rights acquired, before September 1, 1939.").

[16] Appellants in *Gerling* originally challenged two other statutes that did attempt to force payment of Nazi-era insurance claims, *see* Cal. Code Civ. Proc. § 354.5; Cal. Ins. Code § 790.15, but those claims were dismissed for lack of standing and not addressed on appeal. *Gerling*, 240 F.3d at 745; *see also Gerling Global Reinsurance Corp. of Am. v.*

(Continued on following page)

attempt to hold defendants liable for their past wartime conduct; it therefore does not implicate the exclusive power of the federal government to make and resolve war, including the resolution of claims arising out of such actions.

Section 354.6 runs afoul of the restriction on the exercise of foreign affairs powers by the states. Because California lacks the power to create a right of action – or, alternatively, to resurrect time-barred claims – in order to provide its own remedy for war-related injuries inflicted by our former enemies and those who operated in their territories, we hold that section 354.6 is unconstitutional.

III. Statutes of Limitations

In addition to section 354.6, Appellants bring various tort claims under common law, California statutory and constitutional law, as well as for violations of international law under the Alien Tort Claims Act, 28 U.S.C. § 1350 ("ATCA"). *See supra*. All these claims are barred by their respective statutes of limitations.

Appellants apparently bring their common law claims under California law, although in many instances they do not identify the jurisdiction under whose law they seek relief. Some of the parties, including both defendants and plaintiffs, are California residents, while others are not; the alleged injuries all took place outside of California. Regardless of the source of the substantive law, because all the claims, including both common law and statutory, were brought in California state court or in a district court

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Low, 296 F.3d 832, 842 & n.7 (9th Cir. 2002), *cert. granted sub nom. Am. Ins. Ass'n v. Low*, 71 U.S.L.W. 3373 (2003).

within California, we apply to them the statute of limitations that would be applied in California state court.[17] California applies the "governmental interest" approach to conflict of law issues. *Hurtado v. Superior Court,* 11 Cal. 3d 574, 579-80 (1974). Under this approach, the correct choice of law depends on "an analysis of the respective interests of the states involved." *Id.* at 579. Where the conflict concerns a statute of limitations, the governmental interest approach generally leads California courts to apply California law. Witkin, 3 CALIFORNIA PROCEDURE § 104 (4th ed. 1996); *see, e.g., Peterson v. Kennedy,* 771 F.2d 1244, 1251 n.4 (9th Cir. 1985); *American Bank of Commerce v. Corondoni,* 169 Cal. App. 3d 368 (Ca. Ct. App. 1985), and especially so where California's statute would bar a claim. California's interest in applying its own law is strongest when its statute of limitations is shorter than that of the foreign state, because a "state has a substantial interest in preventing the prosecution in its courts of claims which it deems to be 'stale.' Hence, subject to rare exceptions, the forum will dismiss a claim that is barred by its statute of limitations." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142, cmt. f (1988).

All the claims in the cases before us, other than those under the ATCA, have been stale for several decades under the applicable California statutes of limitations. *See* Cal. Code Civ. Proc. § 340 (one-year statute for personal injury torts, wrongful death and false imprisonment); *id.* § 338 (three-year statute for taking of or injury to personal

[17] The district court addressing the claims brought by Korean and Chinese Appellants found that the non-federal claims would be time-barred under Chinese and Japanese law, as well as under the law of California. *Forced Labor (Koreans),* 164 F. Supp. 2d at 1182.

property, and for fraud); Cal. Bus. & Prof. Code § 17208 (four-year statute for claims of unfair business practices). Only an extraordinarily strong interest of a foreign state in keeping these claims alive could overcome the presumption that California will not hear claims that have been stale for so long under its own law. No such strong foreign interest has been demonstrated here.

The statute of limitations under the ATCA is 10 years. *Doe v. Unocal Corp.*, ___ F.3d ___, 2002 U.S. App. LEXIS 19263, at *27 (9th Cir. 2002).[18] Appellants have thus brought these claims far too late as well.[19]

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[18] The 10-year limit is not stated in the provision. Rather, we adopted it from the Torture Victim Protection Act, *see* Pub.L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350, statutory notes) ("TVPA"), which has an explicit 10-year statute. *Papa v. United States,* 281 F.3d 1004, 1011-13 (9th Cir. 2002). We did so because where a federal statute lacks a specified statute of limitations,

> courts apply the limitations period provided by the jurisdiction in which they sit unless "a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking."

Papa, 281 F.3d at 1011-12 (citing *North Star Steel Co. v. Thomas,* 515 U.S. 29, 35 (1995)). We held that ATCA was closely analogous to the TVPA both in its purpose and in its mechanism for achieving that purpose. *Papa,* 281 F.3d at 1012. Appellants ask us to reconsider our decision in *Papa,* at least as it applies to the present cases, and hold that the ATCA is more closely analogous to section 354.6 than to the TVPA. The result, Appellants argue, would be that the claims are not barred until 2010. For the reasons we stated in *Papa,* and because we hold that section 354.6 is unconstitutional, we reaffirm that the ATCA statute of limitations in this case, as in other cases, is 10 years.

[19] Some Appellants who did not bring a claim under the ATCA argue that they should be permitted to amend their complaints to do so. In light of our holding, such an amendment would be futile.

Some Appellants contend, however, that their claims under both state law and the ATCA are equitably tolled and could therefore survive our invalidation of section 354.6. Although the district court found that they did not allege facts sufficient to trigger equitable tolling, these Appellants contend that they were not required to allege such facts, because a statute of limitations is an affirmative defense, which a plaintiff is not required to anticipate in the complaint. They also contend that even if they were required to allege such facts, the district court should have granted them leave to amend in order to give them the opportunity to do so. The curious aspect of this argument is that all of the Appellants who make this argument *did* plead equitable tolling in their complaints. Furthermore, they alleged *facts* that they believed would trigger such tolling. They alleged, for example, that the defendants had kept the plaintiffs ignorant of essential facts in the defendants' possession. The district court considered these alleged facts and found them insufficient to trigger tolling. *Forced Labor (Koreans),* 164 F. Supp. 2d at 1181-82. Although the court's discussion of equitable tolling concerned only the ATCA, its reasoning applies equally to the state law claims. On appeal, these Appellants offer neither a satisfactory answer to the district court's finding regarding equitable tolling nor any hint of any additional facts that they might allege in an amended complaint. Under these circumstances, amendment would be futile. We therefore find no abuse of discretion in the district court's dismissal of the complaints with prejudice.[20]

[20] Deutsch argues for the first time on appeal that he should be permitted to amend his complaint to include a claim under the TVPA.

(Continued on following page)

IV. Jurisdiction

In many of the cases before us, there is indisputable federal jurisdiction. In some, for example in *Deutsch* and in *Dunn v. Nippon Steel Corp.*,[21] there is diversity jurisdiction. 28 U.S.C. § 1332. Appellants in several other cases, for example in *Terrence v. Mitsui & Co., Wheeler v. Mitsui & Co.,* and *Kim v. Ishikawajima Harima Heavy Indus. Co.*, assert claims under international law, thus giving rise to federal subject matter jurisdiction under 28 U.S.C. § 1331.

He offers no explanation, however, for why he failed to bring that claim in his first amended complaint. Moreover, as noted above, the TVPA has an explicit statute of limitation of 10 years. Deutsch argues that that period commenced on the effective date of the Act, rather than on the date on which the injury was complete. He cites no authority for this proposition, and we do not find it to be a reasonable or plausible one. As Deutsch notes, we have held that the TVPA is applicable to acts that took place prior to the effective date of the Act. *Alvarez-Machain v. United States,* 107 F.3d 696, 702-03 (9th Cir. 1996). In *Alvarez-Machain,* however, the plaintiff filed his claim only three years after the date of the alleged injury. *Id.* at 700. Nothing in our cases or the statute suggests that Congress intended the TVPA to open the federal courts to claims that were already more than 40 years old when the statute became effective or that no time limit exists under the TVPA as to the resurrection of claims for damages that may have occurred in the far distant past. Because the TVPA has a 10-year statute of limitations, permitting Deutsch to amend his complaint would be futile. We therefore affirm the dismissal with prejudice.

[21] In *Dunn,* the amount in controversy is not stated in the complaint, nor was the amount determined by the district court. However, the Appellant seeks compensation and punitive damages for roughly three years of withheld wages, as well as for severe physical and mental injuries he suffered at the hands of the defendants and their predecessors during that time. There is thus no doubt that this case meets the $75,000 minimum amount in controversy required for diversity jurisdiction under 28 U.S.C. § 1332.

Among the many cases that have been consolidated, there are some individual cases as to which federal jurisdiction may be uncertain. Appellants in those cases originally sought relief in state court, under state law,[22] against non-diverse defendants. After removal and consolidation, some of the Appellants sought remand to state court. The district court denied their motions, *Forced Labor (Allied I)*, 114 F. Supp. 2d at 943, on the ground that "the complaints . . . , on their face, implicate the federal common law of foreign relations." *Id.* Appellees opposed remand on other grounds as well. Appellants in some of these cases – not precisely the same group that moved for remand below – now argue that federal jurisdiction is lacking.

Normally, of course, we would address all jurisdictional issues as an initial matter, as they would determine whether we could proceed to the merits. The situation is different with respect to the cases consolidated here, because the cases over which jurisdiction is disputed raise no merits issues that are not also raised by one or more cases over which jurisdiction is certain and which have been consolidated with the disputed cases. In short, we are compelled to address all of the merits issues in these consolidated cases, regardless of whether there is jurisdiction over each of them. Furthermore, the ultimate survival of all of these cases depends on the validity of the provisions of section 354.6. In light of our holding that section 354.6 is unconstitutional, remand to state court of the

[22] Although some plaintiffs amended or sought to amend their complaints, after removal, to include federal claims, such amendments do not bear on the evaluation of removal jurisdiction. *Abada v. Charles Schwab & Co.*, 300 F.3d 1112, 1117 (9th Cir. 2002).

cases of uncertain federal jurisdiction would be futile, as the state court would simply dismiss the claims with prejudice. *See Bates v. Jones,* 127 F.3d 870, 873 (9th Cir. 1997) (noting that the California Supreme Court "has yet to disregard a directly applicable decision of this court on a question of federal law"). Therefore, our determination of the uncertain jurisdictional issues could have no effect on the outcome of any of the cases.

For these reasons, we decline to address the uncertain jurisdictional issues and simply affirm the district court's dismissal of all the cases before us.

Conclusion

For the foregoing reasons, we hold that California Code of Civil Procedure section 354.6 is an unconstitutional intrusion on the foreign affairs power of the United States and that Appellants' remaining claims are barred by the applicable statutes of limitations. The judgments of the district courts are

AFFIRMED.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEF TIBOR DEUTSCH, an individual; JOSEF TIBOR DEUTSCH, as the survivor of George Deutsch,

Plaintiffs-Appellants,

v.

TURNER CORPORATION, a Delaware Corporation with corporate regional headquarters located in California; KITCHELL CORPORATION USA, an Arizona Corporation authorized to do business in California; Hochtief AG, a German Corporation,

Defendants-Appellees.

No. 00-56673

D.C. No.
CV-00-04405-SVW

Appeal from the United States District Court
for the Central District of California
Stephen V. Wilson, District Judge, Presiding

WOODROW M. HUTCHSION,

Plaintiff-Appellant,

v.

MITSUBISHI MATERIALS CORPORATION; MITSUBISHI MATERIALS USA, a business association purporting to be a California corporation; MITSUBISHI CORPORATION, a Japanese business association;

No. 01-17115

D.C. No.
CV-00-02163-VRW

MITSUBISHI INTERNATIONAL CORPORATION, a business association purporting to be a New York corporation; MITSUBISHI HEAVY INDUSTRIES, LTD., a Japanese business association; MITSUBISHI HEAVY INDUSTRIES AMERICA, INC., a business association purporting to be a Delaware corporation,

Defendants-Appellees.

LESTER I. TENNY,

Plaintiff-Appellant,

v.

MITSUI & CO. LTD., a Japanese business association; MITSUI & CO (USA), Inc, a business association purporting to be a New York Corporation; MITSUI MINING CO LTD, a Japanese business association; MITSUI MINING USA INC, a business association purporting to be a Delaware corp,

Defendants-Appellees.

No. 01-17116

D.C. No. CV-00-02357-VRW

SHIRLEY M. RUBENSTEIN; JULIA E. STEVENSON; GLEN LEROY, individually and on behalf of a class of persons similarly situated,

Plaintiffs-Appellants,

v.

No. 01-17123

D.C. No. CV-00-03737-VRW

ISHIHARA SANGYO KAISHA, LTD; ISHIHARA CORPORATION, a California corporation; Isk Americas, Inc., a Delaware corporation,

Defendants-Appellees.

RAYMOND HEIMBUCH; VIVIAN O. JOHNSON; WILLIAM R. LOWE; SAM P. BUSE; ALFRED BEREST EDWIN F. LINDROS; MICHAEL BIBIN; J. S. GRAY; KARL WILLIAM HOLT; NORMAN R. MATTHEWS; DARREL D. STARK; CARMEL ZIPETO,

Plaintiffs-Appellants,

v.

ISHIHARA SANGYO KAISHA, LTD, a Japanese business association; ISHIHARA CORPORATION; ISK AMERICAS, INC., a business association purporting to be a Delaware corporation,

Defendants-Appellees.

No. 01-17124

D.C. No. CV-00-00064-VRW

MELODY SOLIS, individually and on behalf of a class of persons similarly situated,

Plaintiff-Appellant,

v.

NIPPON STEEL CORPORATION, a Japanese business association; NIPPON STEEL TRADING CO., LTD.,

No. 01-17134

D.C. No. CV-00-02359-VRW

a Japanese business association; NIPPON STEEL USA INC, a business association purporting to be a New York corportion; NIPPON STEEL TRADING AMERICA,

Defendants-Appellees.

HARRY CORRE,

Plaintiff-Appellant,

v.

MITSUI & CO. LTD; MITSUI & COMPANY (USA), INC.; MITSUI MINING USA INC; MITSUI MINING CO., LTD.,

Defendants-Appellees.

No. 01-17155

D.C. No. CV-00-02690-VRW

GARTH G. DUNN,

Plaintiff-Appellant,

v.

NIPPON STEEL CORPORATION, a Japanese business association; NIPPON STEEL USA, a business association purporting to be a New York Corp.,

Defendants-Appellees,

and

JAPAN IRON & STEEL, a Japanese business association; YAWATA IRON & STEEL, a Japanese business association; FUJI IRON & STEEL, a Japanese business

No. 01-17157

D.C. No. CV-00-03239-VRW

association; MITSUBISHI CORPORATION, a Japanese business association; MITSUBISHI SHOJI; SUMITOMO CORP.; SUMITOMO COMMERCIAL COMPANY, a Japanese business association,

Defendants.

JAMES O. KING,

Plaintiff-Appellant,

v.

NIPPON STEEL CORP; NIPPON STEEL USA,

Defendants-Appellees.

No. 01-17160

D.C. No. CV-99-05042-VRW

PERFECTO LLANZA, on his own behalf and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

MITSUI & CO (USA), INC, a business association; MITSUI MINING CO., LTD., a Japanese business association; Mitsubishi Corporation; Nippon Steel Corp, a Japanese business association; Nippon Steel USA Inc.,

Defendants-Appellees.

No. 01-17172

D.C. No. CV-00-03240-VRW

ALBERTO SALDAJENO; ACELOPIO GALEDO; GENEROSO JACOB, individually and on behalf of a class of persons similarly situated,

Plaintiffs-Appellants,

v.

ISHIHARA SANGYO KAISHA, LTD, a Japanese business association; ISHIHARA CORPORATION (USA); TAIHEIYO CEMENT, a Japanese business association; ONODA USA,

Defendants-Appellees.

No. 01-17176

D.C. No.
CV-00-02960-VRW
CV-00-03240-VRW
CV-00-03828-VRW

ERNESTO SANTO DOMINGO, individually and on behalf of a class of persons similarly situated; IMEDLA SANTO DOMINGO, individually and on behalf of a class of persons similarly situated,

Plaintiffs-Appellants,

v.

ISHIHARA SANGYO KAISHA, LTD, a Japanese corporation; ISHIHARA CORPORATION U.S.A., California corporation,

Defendants-Appellees.

No. 01-17177

D.C. No.
CV-00-03828-VRW

MANUEL A. ENERIZ; DEXTER ENERIZ, Executor of the Estate of Manuel A. Eneriz,

Plaintiffs-Appellants,

v.

MITSUI & COMPANY LTD.; MITSUI & COMPANY (USA), INC.; MITSUI MINING COMPANY, LTD. MITSUI MINING USA INC,

Defendants-Appellees.

No. 01-17185

D.C. No. CV-00-02691-VRW

RALPH LEVENBERG, on behalf of himself and all others similarly situated,

Plaintiff-Appellant,

v.

NIPPON SHARYO LTD.; NIPPON SHARYO USA., INC.,

Defendants-Appellees.

No. 01-17189

D.C. No. CV-99-01554-VRW

HAROLD W. POOLE; ERNEST LOY; FRANCIS W. AGNES; ROBERT C. CLARK; CLARENCE S. KELLOGG, *Plaintiffs-Appellants,* v. NIPPON STEEL CORP, a Japanese business association; NIPPON STEEL TRADING CO., LTD., a business association purporting to be a New York corporation; NIPPON STEEL TRADING AMERICA, a business association purporting to be a California corporation, *Defendants-Appellees.*	No. 01-17195 D.C. No. CV-00-02360-VRW
SUK YOON KIM, on behalf of himself and all others similarly situated, *Plaintiff-Appellant,* v. ISHIKAWAJIMA HARIMA HEAVY INDUSTRIES LTD.; IHI INC.; SUMITOMO HEAVY INDUSTRIES LTD.; SUMITOMO HEAVY INDUSTRIES (USA) INC., *Defendants-Appellees.*	No. 01-17197 D.C. No. CV-99-05303-VRW
ZHENHUAN MA, *Plaintiff-Appellant,* v.	No. 01-17201 D.C. No. CV-01-02592-VRW

KAJIMA CORPORATION; KAJIMA CONSTRUCTION SERVICES, INC.; KAJIMA DEVELOPMENT CORPORATION; KAJIMA ENGINEERING AND CONSTRUCTION, INC.; KAJIMA INTERNATIONAL, INC.; KAJIMA U.S.A., INC,

Defendants-Appellees.

SA SON SIN,

Plaintiff-Appellant,

v.

MITSUI & CO, LTD.; MITSUI & CO. (USA); MITSUI ENGINEERING & SHIPBUILDING CO., LTD.; PACECO CORPORATION,

Defendants-Appellees.

No. 01-17203

D.C. No. CV-00-03242-VRW

RUBEN RESUS; CARLOS CADENILLA, individually and on behalf of a class of persons similarly situated,

Plaintiffs-Appellants,

v.

MITSUI & CO. LTD., a Japanese business association; MITSUI BUSSAN KAISHA; MITSUI & CO (USA), INC; MITSUBISHI CORPORATION; MITSUBISHI INTERNATIONAL CORPORATION, a business corporation; MITSUBISHI HEAVY INDUSTRIES, LTD., a Japanese business association;

No. 01-17204

D.C. No. CV-00-03313-VRW

MITSUBISHI HEAVY INDUSTRIES AMERICAN INC., a business association; MITSUBISHI MATERIALS CORPORATION, a Japanese association; MITSUBISHI MATERIALS USA CORPORATION, a business association; SUMITOMO CORP., a Japanese business association; SUMITOMO CORP. OF AMERICA, a business association; KUREHA CORPORATION OF AMERICA, a business association; FURUKAWA ELECTRIC NORTH AMERICA, INC., a business association; TAIHEIYO CEMENT, a Japanese business association; ONODO USA INC., a business association; SHOWA DENKO K K, a Japanese business association,

Defendants-Appellees.

SHANG-TING SUNG,

Plaintiff-Appellant,

v.

MITSUI & CO, LTD.; MITSUI & CO. (USA); MITSUBISHI CORPORATION; MITSUBISHI INTERNATIONAL CORPORATION; MITSUI MINING CO., LTD.; MITSUI MINING USA INC.,

Defendants-Appellees.

No. 01-17207

D.C. No.
CV-00-02358-VRW

RAYMOND WHEELER; ALEC CHARLES MURPHY; WILLIAM SCHMITT; HENDRICK ZEEMAN; TAMMERUS WILLEM CARTER-VISSCHER; DAVID CLARKE; WILLEM HENDRIK DE HAAN,

Plaintiffs-Appellants,

v.

MITSUI & CO. LTD, a Japanese business association; MITSUI & COMPANY (USA), INC., a business association; MITSUI MINING COMPANY, LTD., a Japanese business association; MITSUI MINING USA INC; NIPPON STEEL USA; MITSUBISHI CORPORATION, MITSUBISHI INTERNATIONAL CORP.; MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.; MITSUBISHI MATERIALS USA CORPORATION; MITSUBISHI HEAVY INDUSTRIES, LTD.,

Defendants-Appellees.

No. 01-17210

D.C. No. CV-00-04278-VRW

JAE SIK CHOE,

Plaintiff-Appellant,

v.

NIPPON STEEL CORPORATION; MITSUBISHI HEAVY INDUSTRIES, LTD.

Defendants-Appellees.

No. 01-17211

D.C. No. CV-99-05309-VRW

FRANK A. MENTE; NEVILLE J. BOOKER, individually and on behalf of persons similarly situated,

Plaintiffs-Appellants,

v.

MITSUI & CO. LTD, a Japanese association, AKA/Mitsui Bussan Kaisha; MITSUI MINING COMPANY, LTD., a Japanese business association; MITSUI & COMPANY (USA), Inc., a business association; NIPPON STEEL CORPORATION, a Japanese corporation; NIPPON STEEL USA INC., a business association; MITSUBISHI CORPORATION, a Japanese business association; MITSUBISHI MATERIALS USA CORPORATION; MITSUBISHI MATERIALS CORPORATION, a Japanese business association; MITSUBISHI HEAVY INDUSTRIES, LTD., a Japanese business association; MITSUBISHI INTERNATIONAL CORPORATION, a business corporation,

Defendants,

and

MITSUI MINING USA INC, a business association; MITSUBISHI HEAVY INDUSTRIES AMERICA INC., a business association,

Defendants-Appellees.

No. 01-17230

D.C. No.
CV-00-03530-VRW

AIZHU SU, on behalf of himself and all others similarly situated; CHUNSHENG TIAN, on behalf of himself and all others similarly situated,

Plaintiffs-Appellants,

v.

MITSUBISHI CORPORATION, a corporation; MITSUBISHI CORPORATION, a corporation; MITSUI & CO., LTD. a corporation; MITSUI MINING COMPANY, LTD., a corporation; MITSUI & COMPANY (USA), INC., a corporation; MITSUI MINING USA INC, a corporation,

Defendants-Appellees.

No. 01-17243

D.C. No. CV-00-03586-VRW

DO GEUN OH; EUNG CHANG LEE; YONG HAE LEE, individually and on behalf of a class of persons similarly situated,

Plaintiffs-Appellants,

v.

MITSUI & CO., LTD, a Japanese business association; MITSUI & CO. (USA), a business association; MITSUBISHI CORPORATION, a Japanese business association; MITSUBISHI CORPORATION, a business association; MITSUBISHI HEAVY INDUSTRIES LTD., a Japanese business association; MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.,

No. 01-17251

D.C. No. CV-00-03752-VRW

a business association; MITSUBISHI MATERIALS CORPORATION, a Japanese business association; MITSUBISHI MATERIALS USA CORPORATION, a business association; NIPPON STEEL CORP, a Japanese business association; NIPPON STEEL USA, a business association; SHOWA DENKO AMERICA, INC., a business association; SHOWA KOGYO, a Japanese business association,

Defendants-Appellees.

GLORIA TYLER ALFANO; MADELINE FELKINS; WARREN CARRINGER; HOWARD FRIEDMAN, Dr.; RICHARD GORDON, Maj.; OAKIE DENT PACK, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

MITSUI & COMPANY (USA), INC.; MITSUI MINING COMPANY, LTD.; MITSUI MINING USA INC; MITSUBISHI CORPORATION, a corporation; MITSUBISHI CORPORATION; MITSUBISHI HEAVY INDUSTRIES AMERICA INC., a corporation; MITSUBISHI HEAVY INDUSTRIES, LTD., a corporation,

Defendants-Appellees.

No. 01-17252

D.C. No.
CV-00-04277-VRW

H. JOSEPH TERRENCE, aka JOSEPH E. TERFANSKY; FRANKLIN D. GROSS; FREDERICK M. FULLERTON, JR.; ERMA L. WEIMER,

Plaintiffs-Appellants,

v.

MITSUI & CO., LTD., a Japanese business corporation aka Mitsui Bussan Kaisha; MITSUI & COMPANY (USA), INC., a business association; MITSUI MINING USA INC, a business association; MITSUBISHI CORPORATION, a Japanese business association; MITSUBISHI MATERIALS CORPORATION, a Japanese business association; MITSUBISHI HEAVY INDUSTRIES, LTD., a Japanese business association; MITSUBISHI MATERIALS USA CORPORATION, a business association; MITSUBISHI CORPORATION, a business association; MITSUBISHI HEAVY INDUSTRIES AMERICA, INC., a business association,

Defendants-Appellees.

No. 01-17260

D.C. No. CV-00-03648-VRW

ARTHUR TITHERINGTON; HENVRY GEORGE BLACKHAM; FERGUS DUNSMORE MCGHIE, on behalf of themselves and others similarly situated,

Plaintiffs-Appellants,

No. 01-17265

D.C. No. CV-00-02689-VRW

v.

JAPAN ENERGY CORP, a Japanese business association; JAPAN ENERGY USA, a Delaware Corporation; IRVINE SCIENTIFIC SALES, a California Corporation,

Defendants-Appellees.

FINNIE B PRICE, On behalf of himself and all others similarly situated,

Plaintiff-Appellant,

v.

MITSUBISHI CORPORATION; MITSUBISHI HEAVY INDUSTRIES, LTD., a corporation; MITSUBISHI HEAVY INDUSTRIES AMERICA INC.; MITSUBISHI INTERNATIONAL CORPORATION, a corporation; MITSUI & CO (USA) INC.; MITSUI & CO. LTD., a corporation; MITSUI MINING CO LTD; MITSUI MINING USA INC, a corporation,

Defendants-Appellees.

No. 01-17499

D.C. No. CV-00-02761-VRW

OPINION

Appeal from the United States District Court for the Northern District of California Vaughn R. Walker, District Judge, Presiding

Argued and Submitted October 7, 2002 – Pasadena, California

Filed January 21, 2003

Before: Stephen Reinhardt, Stephen S. Trott and Barry G. Silverman, Circuit Judges.

Opinion by Judge Reinhardt

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OPINION

REINHARDT, Circuit Judge

Plaintiffs-Appellants in these consolidated cases allege that they were forced to work as slave laborers for German and Japanese corporations during the Second World War. They seek damages and other remedies for lost wages and for other atrocious injuries they suffered in the course of their forced labor. Defendants-Appellees are corporations (or successors or affiliates of those corporations) that allegedly committed these atrocities.

A California statute passed in 1999 creates a cause of action against such defendants for claims involving Second

World War slave labor.[1] Cal. Code Civ. Proc. § 354.6. Under the statute, these claims are not time-barred if commenced on or before December 31, 2010. *Id.* Although Appellants assert a variety of statutory and common law claims for relief, all raise section 354.6 as the primary basis for bringing their suits so many years after the alleged wrongs were committed. Reluctantly, we hold that section 354.6 is invalid under the United States Constitution and that in its absence Appellants' remaining claims are time-barred.

Background

These cases concern the terrible abuses that German and Japanese corporate interests inflicted both on civilians and on soldiers captured by German and Japanese military forces during the Second World War. The corporations and their managers, with the cooperation and encouragement of their governments, subjected many individuals to vicious cruelties and forced them to work long hours without pay. The slave workers were often underfed, physically beaten, exposed to dangerous conditions, and denied medical care; many were murdered, and others died as a result of the maltreatment they suffered. Among these slave laborers were, tragically, many who became victims of the Holocaust, the most atrocious act ever perpetrated by a civilized (or uncivilized) people, an act unparalleled in history. Indeed, the Holocaust represents

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[1] Although the statute distinguishes between "slave laborers," *see* Cal. Code Civ. Proc. § 354.6(a)(1), and "forced laborers," *see* § 354.6(a)(2), the distinction is generally immaterial to the analysis in this opinion. We generally use the term "slave laborer" to refer to both categories of workers.

the worst historic manifestation of the perpetual human condition known as antisemitism, a phenomenon that is still thriving in all too many parts of the world today.[2]

I. The Cases

A. *Deutsch v. Turner*

The suit by Appellant Josef Tibor Deutsch ("Deutsch") is the only action before us concerning wrongs committed by German rather than Japanese corporations and the only action that was not consolidated with other cases by the district court. It is, in other words, the only Holocaust case at issue here, and it, unlike most of the Japanese cases, involves only a single plaintiff.

Currently a resident of California, Deutsch, a Jew, was born and raised in Hungary. Deutsch asserts that, in 1944, when he was a child, the Nazis took over his town and transported him and his brother Georg to Auschwitz. There the brothers were tortured and forced to work as slaves for 14-hour days, seven days a week. Their work was for the benefit of private corporations, which entered

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[2] It is plainly Holocaust survivors who are the intended beneficiaries of section 354.6, which speaks of "concentration camp[s]" and "ghettos[s]," [sic] mentions no power by name other than the "Nazi regime," and never employs the term "Axis Powers," which is the usual collective term for the enemies of the Allied Powers. Ironically, among the hundreds of thousands of plaintiffs in the cases before us, there is only one Holocaust survivor. All the other plaintiffs suffered their injuries in Asia at the hands of Japanese companies. Whatever the intended purpose of the California statute, the text of section 354.6 appears to be broad enough to encompass all the plaintiffs' claims, and not just those of the one Holocaust survivor. We follow the district court and all the parties before us in assuming that such is the case.

into agreements with the Nazi government, whereby they paid the Nazis less than the prevailing wage for the work of the slaves. The corporations for which the Deutsch children labored included Appellee Hochtief AG ("Hochtief"), one of Germany's largest and oldest construction companies. A civilian employee of Hochtief overseeing the slave laborers in their work for Hochtief beat Deutsch's brother Georg. Georg ultimately died from his injuries. By a stroke of good fortune, Deutsch, unlike most of his co-religionists, survived.

On April 7, 2000, Deutsch filed a complaint in the Superior Court of California against Hochtief, its wholly owned subsidiary the Turner Corporation, a Delaware corporation, and the Kitchell Corporation, an Arizona corporation that Hochtief owns in part. Deutsch alleged intentional infliction of emotional distress, unlawful business practices under the California Business and Professions Code, quantum meruit, and wrongful death. The action was removed to federal court on the ground of diversity jurisdiction.

Deutsch's basis for bringing the action so long after the alleged acts is section 354.6 of the California Code of Civil Procedure, which confers jurisdiction on the Superior Court to hear claims by "[a]ny Second World War slave labor victim" or "Second World War forced labor victim," or their heirs, against "any entity or successor in interest thereof, for whom that labor was performed, either directly or through a subsidiary or affiliate." Cal. Code Civ. Proc. § 354.6(b). Section 354.6 permits such actions to be brought on or before December 31, 2010, regardless of any otherwise applicable statute of limitations. § 354.6(c).

The district court dismissed the action as presenting a nonjusticiable political question. *Deutsch v. Turner,* No. CV 00-4405 (C.D. Cal. Aug. 25, 2000).

B. *In re World War II Era Japanese Forced Labor Litigation*

The consolidated appeal before us also involves 28 other suits, all by victims and heirs of victims against Japanese business entities. Some were brought as class actions. Because there are so many complaints, and because the precise factual allegations do not bear on our decision, we do not here recount the details of the injuries that the various Appellants endured. Unlike Deutsch, these individuals – some civilians, some soldiers who were prisoners of war – were not selected because of their religious affiliation and were not victims of an overall plan to exterminate an ethnic or religious group. Rather, they became subject to the Japanese slave labor program either because they opposed the Japanese war efforts, in one capacity or another, or simply because they were in the wrong place at the wrong time. In any event, they were all subjected to serious mistreatment, including starvation, beatings, physical and mental torture, being transported in unventilated cargo holds of ships, and being forced to make long marches under a tropical sun without water. Some survived, while others were ultimately executed, or died from disease or physical abuse.

Twenty-seven of the suits against the Japanese corporate interests were originally brought in California Superior Court, while one was initiated in the United States District Court for the Central District of California. The claimants demanded damages and other relief, raising

claims under California Code of Civil Procedure section 354.6, and alleging, variously, assault and battery, unjust enrichment, conspiracy, false imprisonment, intentional infliction of emotional distress, conversion, quantum meruit, unfair business practices under California Business and Professions Code sections 17200 *et seq.*, involuntary servitude under California Penal Code section 181 and Article I, § 6 of the California Constitution, and violations of international law under the Alien Tort Claims Act, 28 U.S.C. § 1350. As defendants they name both Japanese corporations that they allege committed the injuries and successors and affiliates of those corporations. The suits filed in state court were removed to federal court; all were then consolidated in the Northern District of California. The district court denied motions to remand and dismissed all claims.

Appellants in the majority of the Japanese cases were, at the time of the occurrences that form the basis for these lawsuits, nationals of the United States or of other Allied nations. Many were in military service and were taken as prisoners of war. The district judge dismissed these cases on the ground that they were barred by a provision of the Treaty of Peace ending the war between the Allied Powers and Japan.[3] *In re World War II Era Japanese Forced Labor*

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[3] The provision that had this effect is Article 14(b), which provides as follows:

> Except as otherwise provided in the present Treaty, the Allied Powers waive all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war, and claims of the Allied Powers for direct military costs of occupation.

(Continued on following page)

Litig., 114 F. Supp.2d 939, 944-49 (N.D. Cal. 2000) (*Forced Labor (Allied I)*); *In re World War II Era Japanese Forced Labor Litig.*, No. MDL-1347 (N.D. Cal. Feb. 8, 2001) (*Forced Labor (Allied II)*); *In re World War II Era Japanese Forced Labor Litig.*, 164 F. Supp. 2d 1153, 1157 (N.D. Cal. 2001) (*Forced Labor (Filipinos)*).

Appellants in the remaining cases were Korean and Chinese nationals. The district court held that their claims were not affected by the Treaty of Peace between the Allies and Japan, because these claimaints were not Allied nationals or nationals of any signatory of that treaty. *In re World War II Era Japanese Forced Labor Litig.*, 164 F. Supp. 2d 1160, 1165-68 (N.D. Cal. 2001) (*Forced Labor (Koreans)*). The court dismissed these cases nonetheless, on the grounds that section 354.6 was an unconstitutional intrusion on the foreign affairs powers of the United States, and that the remaining claims were time-barred. *Id.* at 1168-78.

II. Constitutionality of Section 354.6 Under Foreign Affairs Doctrine

A. Section 354.6 and Its Effect

All Appellants rely on section 354.6 of the California Code of Civil Procedure. Because it can best be understood when read as a whole, we quote it in full:

Treaty of Peace with Japan, Sept. 8, 1951, art. 14(b), 3 U.S.T. 3169, T.I.A.S. No. 2490. The district court held that claims by Allied nationals against Japanese corporations were barred under the clause waiving "other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war." *Forced Labor (Allied I)*, 114 F. Supp. 2d at 944-49 (N.D. Cal. 2000).

§ 354.6.

(a) As used in this section:

(1) "Second World War slave labor victim" means any person taken from a concentration camp or ghetto or diverted from transportation to a concentration camp or from a ghetto to perform labor without pay for any period of time between 1929 and 1945, by the Nazi regime, its allies and sympathizers, or enterprises transacting business in any of the areas occupied by or under control of the Nazi regime or its allies and sympathizers.

(2) "Second World War forced labor victim" means any person who was a member of the civilian population conquered by the Nazi regime, its allies or sympathizers, or prisoner-of-war of the Nazi regime, its allies or sympathizers, forced to perform labor without pay for any period of time between 1929 and 1945, by the Nazi regime, its allies and sympathizers, or enterprises transacting business in any of the areas occupied by or under control of the Nazi regime or its allies and sympathizers.

(3) "Compensation" means the present value of wages and benefits that individuals should have been paid and damages for injuries sustained in connection with the labor performed. Present value shall be calculated on the basis of the market value of the services at the time they were performed, plus interest from the time the services were performed, compounded annually to date of full payment without diminution for wartime or post-war currency devaluation.

> (b) Any Second World War slave labor victim, or heir of a Second World War slave labor victim, Second World War forced labor victim, or heir of a Second World War forced labor victim, may bring an action to recover compensation for labor performed as a Second World War slave labor victim or Second World War forced labor victim from any entity or successor in interest thereof, for whom that labor was performed, either directly or through a subsidiary or affiliate. That action may be brought in a superior court of this state, which court shall have jurisdiction over that action until its completion or resolution.
>
> (c) Any action brought under this section shall not be dismissed for failure to comply with the applicable statute of limitation, if the action is commenced on or before December 31, 2010.

Appellants and the State of California as amicus seek to characterize section 354.6 as a purely procedural measure by reducing its scope to the provision regarding the limitations, as set forth in subsection (c). The entire effect of section 354.6, they argue, is to extend the statute of limitations for claims that are already available to remedy Nazi-era slave labor. They cite an impressive range of possible sources of substantive law prohibiting slave labor, including state statutes and common law, the United States Constitution, and international law. The reference in subsection (c) to "the applicable statute of limitations" supports their interpretation: If a statute of limitations is already "applicable," perhaps it is because subsection (c) contemplates a pre-existing cause of action, rather than a cause of action created under section 354.6.

However, section 354.6 can be viewed as purely procedural only when subsection (c) is viewed in isolation from the rest of the provision. Most important, the first sentence of subsection (b) explicitly creates a cause of action by providing that certain individuals "may bring an action" for certain wrongs. *See Verizon Md. Inc. v. Pub. Serv. Comm'n,* 535 U.S. 635, ___, 122 S. Ct. 1753, 1759 (2002) (noting that language in a statute providing that party "may bring an action" "reads like the conferral of a private right of action"). Appellants' recitation of pre-existing causes of action for slave labor, whether under other statutes or other bodies of law, is therefore fruitless. Regardless of any pre-existing law, the California legislature chose to create a specific cause of action for persons subjected to slave labor by the Nazis and their allies and sympathizers. If confirmation of this reading is required, it is found in those passages of section 354.6 that set forth the details of the new cause of action. The section defines the class of plaintiffs who may sue under that cause of action, *see* § 354.6(a)(1), (2), sets the method for measuring damages, *see* § 354.6(a)(3), and establishes a special rule regarding liability of corporations affiliated with the wrong-doer, *see* § 354.6(b). Even the language of the statute of limitations provision itself limits the application of the statute of limitations to "action[s] brought under this section," thus confirming that section 354.6 creates a cause of action.

Appellants' only remaining argument for the procedural nature of section 354.6 is its placement within the Code of Civil Procedure, in Title Two: Time of Commencing Civil Actions. However, where the meaning of a statutory provision is clear, we do not rely upon the location the legislature chose for it in its system of codification, *see Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.,* 111

F.3d 1322, 1328 (7th Cir. 1997), just as we do not rely upon the headings and titles of sections in such circumstances. *Brotherhood of R.R. Trainmen v. Baltimore & Ohio R.R.*, 331 U.S. 519, 528-29 (1947). The reason for the placement of section 354.6 within the procedural code is, in any event, not difficult to explain: The most striking aspect of the section is, indeed, its statute of limitations, which would allow the commencement of a suit more than 60 years after the occurrence of the injury. *Id.* Section 354.6's placement, therefore, does not change our view that the section is substantive in nature.

The parties debate whether section 354.6 is substantive or procedural primarily in the context of the Appellees' due process challenge, which we do not address. The substantive nature of the provision, however, is relevant also to the foreign affairs doctrine analysis in which we engage below, because a state is more likely to exceed the limits of its power when it seeks to alter or create rights and obligations than when it seeks merely to further enforcement of already existing rights and duties. Because section 354.6 is substantive law, we do not have occasion to address whether the extension of the statute of limitations, without more, would be legally permissible.[4]

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[4] Even if it were merely procedural, section 354.6 would go further than merely extending the statute of limitations for existing claims; it would actually revive claims that had been previously time-barred, thus upsetting the repose of potential defendants. This revival of liability – even civil liability – is troubling. We do not address here whether such a revival violates due process.

B. Foreign Affairs Doctrine Analysis

Appellees argue that section 354.6 exceeds California's power to engage in foreign affairs. We agree.[5]

The Constitution does not create an express, general power over foreign affairs but rather allocates particular powers related to foreign affairs to particular federal actors. It appoints the President as "Commander in Chief of the Army and Navy of the United States," U.S. Const., art. II, § 2, cl. 1, and authorizes him to "make Treaties, provided two thirds of the Senators present concur," to "appoint Ambassadors" with the "Advice and Consent of the Senate," *id.* cl. 2, and to "receive Ambassadors and other public Ministers," *id.* § 3. It grants to Congress the power to "lay and collect . . . Duties, Imposts, and Excises," to "provide for the common Defence," *id.* art. I, § 8, cl. 1, to "regulate Commerce with foreign Nations," *id.* art. I, § 8, cl. 3, to "establish an uniform Rule of Naturalization," *id.* cl. 4, to "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations," *id.* cl. 10, to "declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water," *id.* cl. 11, to "raise and support Armies," *id.* cl. 12, to "provide and maintain a Navy," *id.* cl. 13, and to regulate "the land and naval forces," *id.* cl. 14.

While the Constitution allocates these foreign affairs powers specifically to the federal government, it also expressly prohibits the states from exercising certain foreign relations powers, including both some of those

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[5] Some Appellants assert that federal jurisdiction is lacking over their claims. We address that issue below.

expressly allocated to the federal government and a few others. "No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal" or, without consent of Congress, "lay any Imposts or Duties on Imports or Exports," "keep Troops or Ships of War in time of Peace," "enter into any Agreement or Compact . . . with a foreign Power," or "engage in War, unless actually invaded." *Id.* § 10.

Because the Constitution mentions no general foreign affairs power, and because only a few specified powers related to foreign affairs are expressly denied the states, one might assume that, with certain exceptions, states are free to pursue their own foreign policies. This is not, however, the case. To the contrary, the Supreme Court has long viewed the foreign affairs powers specified in the text of the Constitution as reflections of a generally applicable constitutional principle that power over foreign affairs is reserved to the federal government. The Court has sometimes expressed this principle in expansive terms, declaring, for example, that "[p]ower over external affairs is not shared by the States; it is vested in the national government exclusively." *United States v. Pink,* 315 U.S. 203, 233 (1942); *see also Chae Chan Ping v. United States,* 130 U.S. 581, 606 (1889) (*The Chinese Exclusion Case*) ("For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.").

The implication of the general principle is that "even in [the] absence of a treaty" or federal statute, a state may violate the constitution by "establish[ing] its own foreign

policy." *Zschernig v. Miller*, 389 U.S. 429, 441 (1968).[6] *Zschernig* concerned an Oregon statute that provided for escheat of estate property claimed by a nonresident alien unless United States citizens had reciprocal rights in the country of the alien's residence and foreign heirs in that country would have the right to receive the proceeds of Oregon estates without confiscation. *Id.* at 430-31. The Court held that, while a reciprocity statute of this sort was not facially invalid, probate courts applying it impermissibly relied on

> inquiries into the type of governments that obtain in particular foreign nations – whether aliens under their law have enforceable rights, whether the so-called "rights" are merely dispensations turning upon the whim or caprice of government officials, whether the representation of consuls, ambassadors, and other representatives of foreign nations is credible or made in good faith, whether there is in the actual administration in the particular foreign system of law any element of confiscation.

Id. at 434. In short, the Court found that the application of the statute depended less on an evaluation of the stated law of a particular country than on whether that country's political system was legitimate in the view of the Oregon courts. *See id.* at 440 (noting that state courts had held that communist and fascist countries did not grant rights

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[6] The doctrine has been referred to as "dormant foreign affairs preemption," or simply as "the foreign affairs power." *See Gerling Global Reinsurance Corp. of Am. v. Low*, 240 F.3d 739, 751 n.9 (9th Cir. 2001) (internal quotation marks removed), *cert. granted sub nom. Am. Ins. Ass'n v. Low*, 71 U.S.L.W. 3373 (2003).

reciprocal to those of Oregonians). To condition the application of state law on the political system of a foreign country was "an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress." *Id.* at 432.

Despite the broad language of *Pink* and the *Chinese Exclusion Case,* however, *Zschernig* is "[t]he only case in which the Supreme Court has struck down a state statute as violative of the foreign affairs power." *Int'l Ass'n of Indep. Tanker Owners v. Locke,* 148 F.3d 1053, 1069 (9th Cir. 1998), *rev'd in part on other grounds sub nom. United States v. Locke,* 529 U.S. 89 (2000). *Zschernig* has been applied sparingly, because the Supreme Court has held that a statute does not violate the constitution where it merely has "some incidental or indirect effect in foreign countries." *Clark v. Allen,* 331 U.S. 503, 517 (1947) (upholding facially a statute similar to that subsequently struck as applied in *Zschernig*).[7]

Noting that "the federal government's foreign affairs power . . . . is rarely invoked by the courts," we have declined to invalidate under *Zschernig* a California statute with certain superficial similarities to section 354.6.

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[7] Other courts have, however, invalidated statutes under foreign affairs doctrine. *See, e.g., Nat'l Foreign Trade Council v. Natsios,* 181 F.3d 38, 49-61 (1st Cir. 1999) (invalidating Massachusetts law restricting ability of Massachusetts and its agencies to purchase goods or services from individuals or companies engaged in business with Burma), *aff'd on other grounds sub nom. Crosby v. Nat'l Foreign Trade Council,* 530 U.S. 363 (2000); *Springfield Rare Coin Galleries, Inc. v. Johnson,* 115 Ill. 2d 221, 236-37 (1986) (invalidating state statute excluding South African coins from otherwise generally applicable state tax exemptions).

Gerling Global Reinsurance Corp. of Am. v. Low, 240 F.3d 739, 752 (9th Cir. 2001), *cert. granted sub nom. Am. Ins. Ass'n v. Low,* 71 U.S.L.W. 3373 (2003). *Gerling* concerned California's Holocaust Victim Insurance Relief Act, Cal. Ins.Code §§ 13800-13807 ("HVIRA"), which requires insurers doing business in California to file certain information about any insurance policies that they or companies "related" to them sold in Europe and that were in effect between 1920 and 1945. *Id.; see Gerling,* 240 F.3d at 743, 753. While recognizing that HVIRA involved foreign affairs, we held that it was constitutional because of the combination of two factors: first, "HVIRA, on its face, involves commerce alone" – and thus should be considered under the Supreme Court's foreign commerce cases rather than under the foreign affairs cases; and second, HVIRA "is not, on its face, directed at any particular foreign country" – and thus is comparatively unlikely to interfere with the foreign relations of the federal government. *Id.* at 753.

While *Gerling* shows that the general prohibition against state involvement with external affairs is not as broad as some judicial statements would imply, it also suggests a mode of analysis that is relevant to the cases before us. In particular, *Gerling* distinguishes among statutes according to the foreign affairs functions that they implicate. *Gerling* suggests that statutes that "mainly involve foreign commerce" are among those least likely to be held invalid under the foreign affairs power. *Id.* The regulation of commerce is simply not central to the foreign affairs power that is off limits to states.[8] For present

[8] State regulation of foreign commerce might, however, exceed constitutional limitations under other constitutional doctrines. *See, e.g.,*

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purposes, we must consider the importance to foreign affairs analysis of another subset of foreign affairs powers: the power of the federal government to make and to resolve war, including the power to establish the procedure for resolving war claims.

While neither the Constitution nor the courts have defined the precise scope of the foreign relations power that is denied to the states, it is clear that matters concerning war are part of the inner core of this power. Of the eleven clauses of the Constitution granting foreign affairs powers to the President and Congress, *see supra,* seven concern preparing for war, declaring war, waging war, or settling war.[9] Most of the Constitution's express limitations on states' foreign affairs powers also concern war.[10] Even those foreign affairs powers in the Constitution that do not expressly concern war and its resolution may be understood, in part, as a design to *prevent* war. Indeed, as the *Federalist* shows, supporters of the new Constitution

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Barclays Bank PLC v. Franchise Tax Bd., 512 U.S. 298, 328 (1994) (considering whether state's international tax reporting system violated either dormant commerce clause or federal government's ability to speak in "one voice.")

[9] *See* U.S. Const., art. II, § 2, cl. 1 (making President Commander in Chief); *id.* cl. 2; (authorizing President to make treaties with advice and consent of Senate); *id.* art. I, § 8, cl. 1 (authorizing Congress to "provide for the common Defence"); *id.* cl. 11 (authorizing Congress to declare war); *id.* cl. 12 (authorizing Congress to raise and support armies); *id.* cl. 13 (authorizing Congress to "provide and maintain a Navy"); *id.* cl. 14 (authorizing Congress to regulate "the land and naval forces").

[10] *See id.* § 10 (prohibiting states from entering "any Treaty, Alliance, or Confederation," or, without congressional authorization, from "keep[ing] Troops or Ships of War in time of Peace" and from "engag[ing] in War, unless actually invaded.")

believed that disunity in international affairs risked unnecessary war. *See, e.g.,* THE FEDERALIST, NO. 3, at 13 (Clinton Rossiter ed., 1961) ("[F]ewer just causes of war will be given by the national government, [and] it will also be more in their power to accommodate and settle them amicably."). The Supreme Court cases under the foreign affairs power have also been driven, in part, by this concern. Thus the inheritance provision at issue in *Zschernig,* although superficially unrelated to war, was seen by a Court operating at the height of the Cold War as a potential provocation to foreign powers. " 'Experience has shown,' " the Court wrote in striking the provision, " 'that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government.'" 389 U.S. at 441 (quoting *Hines v. Davidowitz,* 312 U.S. 52, 64 (1941)). Matters related to war are for the federal government alone to address.

Among the six district court decisions we review here, the only one to reach the foreign affairs challenge to section 354.6 held that the provision was unconstitutional under that doctrine for six reasons:

> (1) the terms of section 354.6 and its legislative history demonstrate a purpose to influence foreign affairs directly, (2) the statute targets particular countries, (3) the statute does not regulate an area that Congress has expressly delegated to states to regulate, (4) the statute establishes a judicial forum for negative commentary about the Japanese government and Japanese companies, (5) the Japanese government asserts that litigation of these claims could complicate and impede diplomatic relationships of the countries involved, and (6) the United

> States, through the State Department, contends that section 354.6 impermissibly intrudes upon the foreign affairs power of the federal government.

Forced Labor (Koreans), 164 F. Supp. 2d at 1173. Although we agree that section 354.6 violates the foreign affairs power, we base our holding on a narrower consideration. We hold that section 354.6 is impermissible because it intrudes on the federal government's exclusive power to make and resolve war, including the procedure for resolving war claims.

With section 354.6, California seeks to redress wrongs committed in the course of the Second World War. By its terms, only "Second World War slave labor victims" and "Second World War forced labor victims" can bring suit under the provision. § 354.6(b). The wrong-doers under the statute – the enslaving individuals or entities – include "the Nazi regime, its allies and sympathizers, or enterprises transacting business in any of the areas occupied by or under control of the Nazi regime or its allies or sympathizers." § 354.6(a)(1), (2). The governmental entities are, by definition, wartime enemies of the United States, while the "enterprises" identified in the provision, if not themselves our wartime enemies, were operating in enemy territory and presumably – no party disputes this – with the consent and for the benefit of our wartime enemy. Wrongs committed after the end of the war are not cognizable under section 354.6; the provision concerns only acts that took place during the years leading up to the war and during the years of the war itself. *Id.* In short, California has sought to create its own resolution to a major issue arising out of the war – a remedy for wartime acts that California's legislature believed had never been fairly resolved.

The United States has already exercised its own exclusive authority to resolve the war, including claims arising out of it. It did not choose, however, to incorporate into that resolution a private right of action against our wartime enemies or their nationals. The United States resolved the war against Germany by becoming a party to a number of treaties and international agreements, beginning with the 1945 agreements at Yalta and Potsdam, in which the United States, Britain, and the Soviet Union agreed to extract reparations from Germany and its nationals but did not include a private right of action against either. *See* Protocol of the Proceedings, Berlin (Potsdam) Conference, Aug. 2, 1945, art. (B)(111), 3 Bevans 1207. Subsequent agreements also failed to create a private right of action, including the Paris Reparations Treaty of 1946 between the United States and 17 other nations, Agreement on Reparations From Germany, Jan. 14, 1946, 61 Stat. 3157, T.I.A.S. 1655 ("Paris Reparations Treaty"); the Transition Agreement of 1952 between the Western Powers and the Federal Republic of Germany, Convention Between the United Kingdom of Great Britain and Northern Ireland, France, the United States of America and the Federal Republic of Germany on the Settlement of Matters Arising Out of the War and the Occupation, May 26, 1952 (as amended by Schedule IV to the Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany, Oct. 23, 1954), 6 U.S.T. 4117, 331 U.N.T.S. 219; the London Debt Agreement of 1953 between the United States and 20 other nations, Agreement on German External Debts, Feb. 27,

1953, 4 U.S.T. 443, 333 U.N.T.S. 3; and the Two-Plus-Four Treaty, which reunified Germany and became effective on March 15, 1991, Treaty on the Final Settlement with Respect to Germany, Sept. 12, 1990, 29 I.L.M. 1186.[11] Most recently, the Foundation Agreement of July 17, 2000, an executive agreement between the governments of Germany and the United States, provided a limited form of remedy for claimants such as Deutsch. Agreement Between the Government of the United States of America and the Government of the Federal Republic of Germany Concerning the Foundation "Remembrance, Responsibility and the Future." The Foundation was created by Germany, in negotiation with the United States, five Central and

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[11] For useful and accessible surveys of these agreements as they apply to war reparations, see *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 448-56 (D.N.J. 1999), and *Burger-Fischer v. DeGussa AG*, 65 F. Supp. 2d 248, 265-73 (D.N.J. 1999). The district court in *Deutsch* relied heavily on these cases and adopted their conclusion that Deutsch's claim raised a nonjusticiable political question, *Deutsch*, No. CV 00-4405, at 2-6, a conclusion with which we disagree. The district court determined that the postwar agreements created the exclusive remedy to the matters raised by Deutsch, and that to order relief would therefore require the court to interfere with the foreign affairs choices of the political branches. *Id.* Under political question doctrine, the court noted, it is impermissible for a court to make policy related to foreign affairs. *Id.* at 2 (citing *Baker v. Carr*, 369 U.S. 186, 211 (1962)). Therefore, the district court supposed, *Deutsch* raised a nonjusticiable political question. The problem with this argument is that it makes every dispute over the proper application of a treaty into a political question, because treaties inherently involve foreign affairs. No political question, however, is raised by the simple application of the requirements of a treaty to which the United States is a party. Treaties have the force of law, *see Missouri v. Holland*, 252 U.S. 416 (1920), and, if they are self-executing or have been implemented through legislation, must be applied by the courts. *See United States v. Alvarez-Machain*, 504 U.S. 655, 667 (1992).

Eastern European countries, Israel, and the non-governmental Conference on Jewish Material Claims Against Germany, for the purpose of making payments to people who suffered at the hands of German companies during the Nazi Era. It provides for payment of up to 15,000 German Marks (roughly $7500) to individual claimants who were subjected to forced labor. *See id.* at Annex A. We do not have the authority to consider the adequacy of such payments here. Indeed, we acknowledge that no possible compensation could be sufficient to remedy the harm done to Holocaust victims and their families.

No party argues that any of these agreements provides the authority for a state of the United States to create a private right of action enabling individuals to recover for wartime injuries against German corporations. Deutsch argues, however, that the terms of these various agreements do not *prohibit* a state from creating such a right of action, and that in the absence of such a prohibition, his action may proceed. Deutsch's argument cannot carry the day. As we explained earlier, the Constitution allocates the power over foreign affairs to the federal government exclusively, and the power to make and resolve war, including the authority to resolve war claims, is central to the foreign affairs power in the constitutional design. In the absence of some specific action that constitutes authorization on the part of the federal government, states are prohibited from exercising foreign affairs powers, including modifying the federal government's resolution of war-related disputes.

The war with Japan ended with the Treaty of Peace, signed in San Francisco, on September 8, 1951, by the representatives of the United States and 47 other Allied powers and Japan, and ratified by the United States

Senate on April 28, 1952. Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169, T.I.A.S. No. 2490. Although the parties dispute whether that treaty by its own terms precludes the claims brought by any of the Appellants,[12] that is the only dispute regarding the treaty. No party asserts that the treaty either creates – explicitly or implicitly – a private right of action against Japan or its nationals, or authorizes states of the United States to create such a right.[13] Once again, without such authorization,

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[12] The central disagreement concerns the meaning of Article 14(b) of the treaty, which is quoted in full *supra* note 3. The district judge held that Appellants' claims were waived because they are claims of Allied nationals "arising out of actions taken by [Japanese] nationals in the course of the prosecution of the war." *Id.; Forced Labor (Allied I),* 114 F. Supp. 2d at 944-49. Appellants argue that the actions of the Appellee corporations were not taken "in the course of the prosecution of the war," or that it is an issue of fact whether they were or not.

[13] Appellants do assert that, if Article 14 of the treaty waives claims against Japanese nationals, as Appellees assert, then Article 14 is superceded [sic] by Article 26. Article 26 provides, in pertinent part:

> Should Japan make a peace settlement or war claims settlement with any State granting that State greater advantages than those provided by the present Treaty, the same advantages shall be extended to the parties to the present Treaty.

Treaty of Peace with Japan, at art. 26. Appellants argue that other foreign states have entered into agreements with Japan that do not waive private claims and that those agreements thereby extend to those foreign states "greater advantages" than the terms extended to the United States. The district court found that Article 26 confers rights only on the "parties" to the treaties, not on individuals. *Forced Labor (Allied I),* 114 F. Supp. 2d at 949. We agree, at least as to the right to invoke the clause. It is the prerogative of the United States, not of California or of Appellants, to determine whether a foreign state has been granted greater advantages and, if so, whether it is in the interest of the United States to incorporate those advantages (along with any concomitant lesser disadvantages) into the treaty. The United States

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states lack the power to alter the federal government's resolution of disputes relating to the war.[14]

The grievances of at least one class of potential plaintiffs identified in section 354.6, prisoners of war, were addressed by the federal government in domestic legislation. *See* § 354.6(a)(2). Under the War Claims Act of 1948, 50 U.S.C. app. §§ 2001-2017p, assets seized from Germany, Japan, or their nationals within the United States and its territory were used to compensate American prisoners of war whose rights had been violated. *See* U.S. FOREIGN CLAIMS SETTLEMENT COMMISSION, SETTLEMENT OF CLAIMS BY THE FOREIGN CLAIMS SETTLEMENT COMMISSION FROM SEPTEMBER 14, 1949 TO MARCH 31, 1955, at 10-11 (1955); 50 U.S.C. app. § 2005(d)(2)(A). The Act required prisoners of war to submit their claims to a federal agency, whose decision was final; it conceived of no private right of action against German or Japanese entities. *See* 50 U.S.C. app. § 2010.

California was dissatisfied with how the federal government chose to address the various wartime injuries suffered by victims of the Nazis and their allies after the United States brought the Second World War to a close. The California legislature found that, under the treaties and compensatory programs that the federal government

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has not invoked Article 26 to authorize a private right of action. Appellants' reliance on the article is, therefore, unavailing.

[14] It is immaterial that many of the Appellants are nationals of two nations, China and Korea, that were not signatories of the San Francisco treaty. When the United States has been a party to a war, the resolution it establishes to that war is the resolution for the whole of the United States. States lack the power to modify that resolution, regardless of the citizenship of those seeking redress.

had established, "victims of Nazi persecution have been deprived of their entitlement to compensation for their labor and for injuries sustained while performing that labor as forced or slave laborers prior to and during the Second World War." 1999 Cal. Stat. 216, § 1(b) (codified in notes to Cal. Code Civ. Proc. § 354.6). The state legislature therefore enacted section 354.6 to remedy these 54-year-old injuries in a manner favored by California but not provided for by the federal government. Appellants assert that no international agreement or other federal action prohibits California from doing so. However, as we have stated, because the issue is the lack of state power, it is immaterial whether the federal government enacted a prohibition. The federal government, acting under its foreign affairs authority, provided its own resolution to the war; California has no power to modify that resolution.[15]

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[15] One might argue that the Holocaust was distinct from the German war effort, that claims for injuries arising from the Holocaust do not, therefore, relate to the war, and that such injuries, because they are unrelated to the war, do not implicate the war powers of the federal government. We need not assume that the acts of enslavement encompassed by section 354.6 served military purposes or advanced the war effort of the Nazis or their allies. We simply note that, by its terms, section 354.6 creates a right of action only for "Second World War" slave labor victims. For the purposes of the provision, the California legislature explicitly defined the harms suffered by such victims as pertaining to the war. Moreover, the federal government's exclusive power to resolve the war necessarily includes an exclusive power to address the injuries that section 354.6 attempts to remedy. The treaties themselves confirm that the federal government regarded all wartime injuries as matters integral to peacemaking, regardless of the purpose or effect of the wrong-doer's acts. In the Paris Reparations Treaty, for example, the United States and the other signatories "agree[d] among themselves that their shares of reparation, as determined by the present Agreement, shall be regarded by each of them as covering all its claims and

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Before concluding our discussion of this issue, we must consider Appellants' most vigorous argument in favor of the constitutionality of section 354.6: that the provision "presents striking parallels" to HVIRA, the insurance reporting requirement that we upheld in *Gerling*. Appellants correctly note two points of similarity: first, like section 354.6, HVIRA is related to Nazi-era wrongs; second, as under section 354.6, at least as applied to the cases before us, the parties regulated by HVIRA are businesses. The similarity ends there, however. Unlike section 354.6, HVIRA does not attempt to require the affected businesses to compensate victims for past wrongs: Specifically, as we noted in *Gerling*, HVIRA does not impose obligations on "European insurance companies to pay or not to pay claims on European policies." *Gerling*, 240 F.3d at 745 (internal quotation marks removed). HVIRA, rather, is merely a reporting requirement and the only consequence of noncompliance is the inability to do business in California in the future. *Id.* Whereas section 354.6 seeks to provide a monetary remedy for decades-old wartime wrongs, HVIRA is a forward-looking regulatory statute. [16] In short, unlike section 354.6, HVIRA does not

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those of its nationals against the former German Government and its Agencies, of a governmental or private nature arising out of the war." Paris Reparations Treaty, Jan. 14, 1946, art. 2(A), 61 Stat. 3157, 3163; *see also, e.g.*, Treaty of Peace with Hungary, Feb. 10, 1947, art. 30(4), 61 Stat. 2109, 2126 (bilateral treaty between Allied Powers and Hungary) ("Hungary waives on its own behalf and on behalf of Hungarian nationals all claims against Germany and German nationals outstanding on May 8, 1945, except those arising out of contracts and other obligations entered into, and rights acquired, before September 1, 1939.").

[16] Appellants in *Gerling* originally challenged two other statutes that did attempt to force payment of Nazi-era insurance claims, *see* Cal.

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attempt to hold defendants liable for their past wartime conduct; it therefore does not implicate the exclusive power of the federal government to make and resolve war, including the resolution of claims arising out of such actions.

Because California lacks the power to create a right of action for war-related claims against our former enemies and those who operated in their territories, and section 354.6 runs afoul of the restriction on the exercise of foreign affairs powers by the states, we hold that section 354.6 is unconstitutional.

III. Statutes of Limitations

In addition to section 354.6, Appellants bring various tort claims under common law, California statutory and constitutional law, as well as for violations of international law under the Alien Tort Claims Act, 28 U.S.C. § 1350 ("ATCA"). *See supra.* All these claims are barred by their respective statutes of limitations.

Appellants apparently bring their common law claims under California law, although in many instances they do not identify the jurisdiction under whose law they seek relief. Some of the parties, including both defendants and plaintiffs, are California residents, while others are not; the alleged injuries all took place outside of California. Regardless of the source of the substantive law, because all

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Code Civ. Proc. § 354.5; Cal. Ins. Code § 790.15, but those claims were dismissed for lack of standing and not addressed on appeal. *Gerling,* 240 F.3d at 745; *see also Gerling Global Reinsurance Corp. of Am. v. Low,* 296 F.3d 832, 842 & n.7 (9th Cir. 2002), *cert. granted sub nom. Am. Ins. Ass'n v. Low,* 71 U.S.L.W. 3373 (2003).

the claims, including both common law and statutory, were brought in California state court or in a district court within California, we apply to them the statute of limitations that would be applied in California state court.[17] California applies the "governmental interest" approach to conflict of law issues. *Hurtado v. Superior Court,* 11 Cal. 3d 574, 579-80 (1974). Under this approach, the correct choice of law depends on "an analysis of the respective interests of the states involved." *Id.* at 579. Where the conflict concerns a statute of limitations, the governmental interest approach generally leads California courts to apply California law. Witkin, 3 CALIFORNIA PROCEDURE § 104 (4th ed. 1996); *see, e.g., Peterson v. Kennedy,* 771 F.2d 1244, 1251 n.4 (9th Cir. 1985); *American Bank of Commerce v. Corondoni,* 169 Cal. App. 3d 368 (Ca. Ct. App. 1985), and especially so where California's statute would bar a claim. California's interest in applying its own law is strongest when its statute of limitations is shorter than that of the foreign state, because a "state has a substantial interest in preventing the prosecution in its courts of claims which it deems to be 'stale.' Hence, subject to rare exceptions, the forum will dismiss a claim that is barred by its statute of limitations." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142, cmt. f (1988).

All the claims in the cases before us, other than those under the ATCA, have been stale for several decades under the applicable California statutes of limitations. *See*

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[17] The district court addressing the claims brought by Korean and Chinese Appellants found that the non-federal claims would be time-barred under Chinese and Japanese law, as well as under the law of California. *Forced Labor (Koreans),* 164 F. Supp. 2d at 1182.

Cal. Code Civ. Proc. § 340 (one-year statute for personal injury torts, wrongful death and false imprisonment); *id.* § 338 (three-year statute for taking of or injury to personal property, and for fraud); Cal. Bus. & Prof. Code § 17208 (four-year statute for claims of unfair business practices). Only an extraordinarily strong interest of a foreign state in keeping these claims alive could overcome the presumption that California will not hear claims that have been stale for so long under its own law. No such strong foreign interest has been demonstrated here.

The statute of limitations under the ATCA is 10 years. *Doe v. Unocal Corp.*, ___ F.3d ___, 2002 U.S. App. LEXIS 19263, at *27 (9th Cir. 2002).[18] Appellants

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[18] The 10-year limit is not stated in the provision. Rather, we adopted it from the Torture Victim Protection Act, *see* Pub.L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350, statutory notes) ("TVPA"), which has an explicit 10-year statute. *Papa v. United States,* 281 F.3d 1004, 1011-13 (9th Cir. 2002). We did so because where a federal statute lacks a specified statute of limitations,

> courts apply the limitations period provided by the jurisdiction in which they sit unless "a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking."

Papa, 281 F.3d at 1011-12 (citing *North Star Steel Co. v. Thomas,* 515 U.S. 29, 35 (1995)). We held that ATCA was closely analogous to the TVPA both in its purpose and in its mechanism for achieving that purpose. *Papa,* 281 F.3d at 1012. Appellants ask us to reconsider our decision in *Papa,* at least as it applies to the present cases, and hold that the ATCA is more closely analogous to section 354.6 than to the TVPA. The result, Appellants argue, would be that the claims are not barred until 2010. For the reasons we stated in *Papa,* and because we

(Continued on following page)

have thus brought these claims far too late as well.[19]

Some Appellants contend, however, that their claims under both state law and the ATCA are equitably tolled and could therefore survive our invalidation of section 354.6. Although the district court found that they did not allege facts sufficient to trigger equitable tolling, these Appellants contend that they were not required to allege such facts, because a statute of limitations is an affirmative defense, which a plaintiff is not required to anticipate in the complaint. They also contend that even if they were required to allege such facts, the district court should have granted them leave to amend in order to give them the opportunity to do so. The curious aspect of this argument is that all of the Appellants who make this argument *did* plead equitable tolling in their complaints. Furthermore, they alleged *facts* that they believed would trigger such tolling. They alleged, for example, that the defendants had kept the plaintiffs ignorant of essential facts in the defendants' possession. The district court considered these alleged facts and found them insufficient to trigger tolling. *Forced Labor (Koreans),* 164 F. Supp. 2d at 1181-82. Although the court's discussion of equitable tolling concerned only the ATCA, its reasoning applies equally to the state law claims. On appeal, these Appellants offer neither a satisfactory answer to the district court's finding regarding equitable tolling nor any hint of any additional facts

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hold that section 354.6 is unconstitutional, we reaffirm that the ATCA statute of limitations in this case, as in other cases, is 10 years.

[19] Some Appellants who did not bring a claim under the ATCA argue that they should be permitted to amend their complaints to do so. In light of our holding, such an amendment would be futile.

that they might allege in an amended complaint. Under these circumstances, amendment would be futile. We therefore find no abuse of discretion in the district court's dismissal of the complaints with prejudice.[20]

IV. Jurisdiction

In many of the cases before us, there is indisputable federal jurisdiction. In some, for example in *Deutsch* and in *Dunn v. Nippon Steel Corp.*,[21] there is diversity jurisdiction. 28 U.S.C. § 1332. Appellants in several other cases, for

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[20] Deutsch argues for the first time on appeal that he should be permitted to amend his complaint to include a claim under the TVPA. He offers no explanation, however, for why he failed to bring that claim in his first amended complaint. Moreover, as noted above, the TVPA has an explicit statute of limitation of 10 years. Deutsch argues that that period commenced on the effective date of the Act, rather than on the date on which the injury was complete. He cites no authority for this proposition, and we do not find it to be a reasonable or plausible one. As Deutsch notes, we have held that the TVPA is applicable to acts that took place prior to the effective date of the Act. *Alvarez-Machain v. United States*, 107 F.3d 696, 702-03 (9th Cir. 1996). In *Alvarez-Machain*, however, the plaintiff filed his claim only three years after the date of the alleged injury. *Id.* at 700. Nothing in our cases or the statute suggests that Congress intended the TVPA to open the federal courts to claims that were already more than 40 years old when the statute became effective or that no time limit exists under the TVPA as to the resurrection of claims for damages that may have occurred in the far distant past. Because the TVPA has a 10-year statute of limitations, permitting Deutsch to amend his complaint would be futile. We therefore affirm the dismissal with prejudice.

[21] In Dunn, the amount in controversy is not stated in the complaint, nor was the amount determined by the district court. However, the Appellant seeks compensation and punitive damages for roughly three years of withheld wages, as well as for severe physical and mental injuries he suffered at the hands of the defendants and their predeces-sors during that time. There is thus no doubt that this case meets the $75,000 minimum amount in controversy required for diversity jurisdiction under 28 U.S.C. § 1332.

example in *Terrence v. Mitsui & Co.*, *Wheeler v. Mitsui & Co.*, and *Kim v. Ishikawajima Harima Heavy Indus. Co.*, assert claims under international law, thus giving rise to federal subject matter jurisdiction under 28 U.S.C. § 1331.

Among the many cases that have been consolidated, there are some individual cases as to which federal jurisdiction may be uncertain. Appellants in those cases originally sought relief in state court, under state law,[22] against non-diverse defendants. After removal and consolidation, some of the Appellants sought remand to state court. The district court denied their motions, *Forced Labor (Allied I)*, 114 F. Supp. 2d at 943, on the ground that "the complaints . . . , on their face, implicate the federal common law of foreign relations." *Id.* Appellees opposed remand on other grounds as well. Appellants in some of these cases – not precisely the same group that moved for remand below – now argue that federal jurisdiction is lacking.

Normally, of course, we would address all jurisdictional issues as an initial matter, as they would determine whether we could proceed to the merits. The situation is different with respect to the cases consolidated here, because the cases over which jurisdiction is disputed raise no merits issues that are not also raised by one or more cases over which jurisdiction is certain and which have been consolidated with the disputed cases. In short, we are compelled to address all of the merits issues in these consolidated cases, regardless of whether there is jurisdiction over

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[22] Although some plaintiffs amended or sought to amend their complaints, after removal, to include federal claims, such amendments do not bear on the evaluation of removal jurisdiction. *Abada v. Charles Schwab & Co.*, 300 F.3d 1112, 1117 (9th Cir. 2002).

each of them. Furthermore, the ultimate survival of all of these cases depends on the validity of the provisions of section 354.6. In light of our holding that section 354.6 is unconstitutional, remand to state court of the cases of uncertain federal jurisdiction would be futile, as the state court would simply dismiss the claims with prejudice. *See Bates v. Jones,* 127 F.3d 870, 873 (9th Cir. 1997) (noting that the California Supreme Court "has yet to disregard a directly applicable decision of this court on a question of federal law"). Therefore, our determination of the uncertain jurisdictional issues could have no effect on the outcome of any of the cases.

For these reasons, we decline to address the uncertain jurisdictional issues and simply affirm the district court's dismissal of all the cases before us.

Conclusion

For the foregoing reasons, we hold that California Code of Civil Procedure section 354.6 is an unconstitutional intrusion on the foreign affairs power of the United States and that Appellants' remaining claims are barred by the applicable statutes of limitations. The judgments of the district courts are

AFFIRMED.

IN RE: WORLD WAR II ERA JAPANESE FORCED LABOR LITIGATION,

This Document Relates To:
Choe v. Nippon Steel Corp., et. al., ND Cal. No. 99-5309;
Kim v. Ishikawajima Harima Heavy Industries Co., Ltd., et. al., ND Cal. No. 99-5303;
Oh v. Mitsui & Co., Ltd., et. al., ND Cal. No. 00-3752;
Sin v. Mitsui & Co., Ltd., et. al., ND Cal. No. 00-3242;
Su v. Mitsubishi Corp., et. al., ND Cal. No. 00-3586;
Sung, et. al. v. Mitsubishi Corp., et. al., ND Cal. No. 00-2358;
Ma v. Kajima Corp., et. al., ND Cal. No. 01-2592

Master File No. MDL-1347

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

The Honorable Vaughn R. Walker

164 F. Supp. 2d 1160;
2001 U.S. Dist. LEXIS 14640; 108 A.L.R.5th 743

September 17, 2001

ORDER NO. 10

The seven above-captioned cases are the only class actions remaining before the court in a set of consolidated cases in which World War II veterans forced to labor without compensation during World War II seek damages and other remedies from Japanese corporations or their successors in interest. These cases are brought by plaintiffs of Korean and Chinese descent. The other matters, which involved United States and Allied veterans, were previously dismissed because the 1951 Treaty of Peace with Japan waived all such claims. *In re World War II Era Japanese Forced Labor Litigation*, 114 F. Supp. 2d 939,

942 (ND Cal 2000) (Order No 4); *see also* Order No. 9. Defendants seek dismissal of the present cases as well.

The Korean and Chinese plaintiffs assert essentially the same claims as the United States and Allied veterans. Their primary cause of action arises under a statute enacted by the California legislature in 1999, California Code of Civil Procedure §§354.6. The statute attempts to provide a cause of action for all individuals forced to labor without compensation by "the Nazi regime, its allies and sympathizers, or enterprises transacting business in any of the areas occupied by or under control of the [same regimes]" by extending the applicable statute of limitations to December 31, 2010. Cal CCP §§354.6(a), (c). The crux of section 354.6 states:

> Any Second World War slave labor victim, or heir of a Second World War slave labor victim, Second World War forced labor victim, or heir of a Second World War forced labor victim, may bring an action to recover compensation for labor performed as a Second World War slave labor victim or Second World War forced labor victim from any entity or successor in interest thereof, for whom that labor was performed, either directly or through a subsidiary or affiliate.

Id. subsection (b). The statute does not limit the cause of action to California residents. *See id.*, subsection (a).

The Korean and Chinese plaintiffs also seek compensation and restitution under various other state laws, and two of the seven complaints assert violations of international law.

Defendants argue that these cases must be dismissed for several reasons. Most significantly, defendants contend

that section 354.6 is unconstitutional as applied against them. Notice of Claim of Unconstitutionality (Doc #243); Def Br (Doc #210) at 19-21; Def. Supp. Br. (Doc #336) at 1; *see also* United States Statement of Interest (SOI) (Doc #302) at 12-17. Defendants argue that application of the statute is unconstitutional because it infringes upon the federal government's exclusive power over foreign affairs and violates the Due Process clause of the Constitution.

Defendants also seek dismissal based on the following arguments: (1) the claims of these plaintiffs are barred by the applicable statute of limitations, (2) the 1951 Treaty of Peace with Japan and subsequent treaties entered by Japan with Korea and China combine to bar the claims, (3) the claims raise nonjusticiable political questions, (4) consideration of the claims violates the principles of international comity, (5) evaluating the claims would contravene the act of state doctrine, (6) the doctrine of forum non conviens precludes this litigation in California and (7) the claims contravene the doctrine of foreign sovereign immunity.

The court concludes that section 354.6 is unconstitutional as applied to defendants in the case at bar because it infringes on the federal government's exclusive power over foreign affairs. To the extent the Korean and Chinese plaintiffs could assert claims under any other law, they are barred by the applicable statute of limitations and other principles of law.

I.

Defendants move to dismiss pursuant to both FRCP 12(b)(6) and 12(c). Defendants move under both provisions because, consistent with the defendants in the Allied

matters, some of the defendants have filed answers in the present cases while others have not. As the court noted in Order No 4, the distinction between the two approaches is not important. The Ninth Circuit instructs that the standard for assessing a FRCP 12(c) motion is the same as the standard for a FRCP 12(b)(6) motion. *See Enron Oil Trading & Transp. Co. v. Walbrook Ins. Co.*, 132 F.3d 526, 529 (9th Cir 1997) (citations omitted). On such motions, all material allegations in the complaint at issue must be taken as true and construed in the light most favorable to the plaintiff. *Pillsbury, Madison & Sutro v. Lerner*, 31 F.3d 924, 928 (9th Cir 1994). Dismissal is only appropriate when it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957). These cases are subject to dismissal based on questions of law only.

II.

As touched upon above, the present cases involve plaintiffs of Korean and Chinese descent. These cases require analysis separate from the cases dismissed earlier not because the Korean and Chinese plaintiffs assert claims that are distinct from the claims of the United States and Allied veterans, but because the cases are brought on behalf of nationals of countries that were not signatories to the 1951 Treaty of Peace with Japan. The treaty was signed only by representatives of the United States and 47 other Allied powers and Japan. *See* Treaty of Peace with Japan, [1952] 3 UST 3169, TIAS No 2490 (1951) (hereinafter, Treaty). Due to various historical and political circumstances during the time the treaty was negotiated and finalized, neither Korea nor China became

a signatory to the treaty. *See* US Dept of State, Record of Proceedings at the Conference for the Conclusion and Signature of the Treaty of Peace with Japan 84-85 (1951) (Exhibits in Support of Motion to Dismiss (Doc #212), Exh B). As the chief negotiator for the United States, John Foster Dulles explained at the time that Korea was not a signatory because technically Korea was part of Japan until the war ended, and thus "Korea was never at war with Japan." *Id.* at 84. With respect to China, Dulles likewise explained that it could not be brought to the negotiating table because "civil war within China and the attitudes of the Allied Governments * * * created a situation such that there [was] not general international agreement upon a single Chinese voice with both the right and the power to bind the Chinese nation to terms of peace." *Id.* at 85.

Hence, although the treaty granted certain rights and benefits to Korea and China, the two countries simply were not signatories to the treaty. According to the plain text of the treaty, therefore, Korea and China do not qualify as "Allied Powers" subject to the waiver provision of Article 14(b). *See* Treaty at 3190. As a result, unlike the claims of the United States and Allied plaintiffs, the Treaty of Peace with Japan cannot be interpreted to waive the claims of the Korean and Chinese plaintiffs.

This circumstance creates a possible paradox that claims of non-Americans arising from forced labor experiences during World War II might be litigated in a court of the United States while the identical claims of American and Allied veterans are barred by the treaty. That possibility lays bare the significant foreign policy questions implicated in these cases and compels the court to address

the constitutionality of the statute upon which they are based.

A.

Before reaching the constitutional issues presented by these cases, the court must address whether the claims of the Korean and Chinese plaintiffs made under section 354.6 are preempted by the Treaty of Peace with Japan. Although defendants simply suggest this in passing, *see* Def. Br. (Doc #210) at 3-4, the United States asserts in its amicus curiae brief that the treaty preempts the claims of all non-Allied plaintiffs, *see* United States SOI (Doc #302) at 9-12. The Korean and Chinese plaintiffs do not directly address this argument. Nevertheless, the Supreme Court instructs that federal courts faced with both statutory questions and constitutional questions should decide the former first in an attempt to avoid unnecessary constitutional inquiries. *See Department of Commerce v. United States House of Representatives,* 525 U.S. 316, 343-44, 142 L. Ed. 2d 797, 119 S. Ct. 765 (1999) (citations omitted); *see also Liberty Warehouse Co. v. Grannis*, 273 U.S. 70, 71 L. Ed. 541, 47 S. Ct. 282 (1927) (applying doctrine to a challenge to a state statute); *Mass State Grange v. Benton*, 272 U.S. 525, 71 L. Ed. 387, 47 S. Ct. 189 (1926) (same).

As a preliminary matter, the court emphasizes that this inquiry is limited to whether the treaty preempts the claims of non-Allied plaintiffs only. To be sure, section 354.6 purports to provide a cause of action for other individuals as well. Indeed, section 354.6 appears to have been motivated mostly by a desire to give California, as opposed to foreign, "residents and citizens * * * a reasonable opportunity to claim their entitlement to compensation for

forced or slave labor performed prior to and during the Second World War." Cal CCP §§ 354.6, note §§ 1(c). But the only cases remaining before the court were brought by nationals of non-signatory nations. Accordingly, the question is not whether the treaty preempts section 354.6 generally, but whether the treaty preempts California's effort to supply a cause of action for non-Allied plaintiffs such as those of Korean and Chinese descent. This order addresses that issue only.

Under Article VI of the Constitution, the laws of the United States are "the supreme Law of the Land; * * * any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." US Const. art. VI, cl. 2. A treaty made by the President with the required approval of two-thirds of the Senate is part of the "supreme law of the land," and thus, similar to federal statutes, valid treaties override any conflicting state law. *Missouri v. Holland*, 252 U.S. 416, 432, 64 L. Ed. 641, 40 S. Ct. 382 (1920); *see also Ware v. Hylton*, 3 U.S. (3 Dall) 199, 1 L. Ed. 568 (1796). A treaty prevails whether it is ratified before or after the enactment of the conflicting state law. Laurence H Tribe, American Constitutional Law §§ 4-4 at 645 (3d ed 2000) (hereinafter, Tribe) (citing *Nielsen v. Johnson*, 279 U.S. 47, 73 L. Ed. 607, 49 S. Ct. 223 (1929)).

Although the Supreme Court has written extensively about when congressional acts have preemptive effect, *see, e.g., Crosby v National Foreign Trade Council*, 530 U.S. 363, 147 L. Ed. 2d 352, 120 S. Ct. 2288 (2000); *United States v. Locke*, 529 U.S. 89, 146 L. Ed. 2d 69, 120 S. Ct. 1135 (2000), it has provided little guidance on the preemptive effect of treaties. For acts of Congress, the Court provides that such legislation preempts state law when (1) Congress expressly provided for preemption, (2) Congress

intended to "occupy the field," or (3) the state law conflicts with the congressional statute at issue. *Crosby*, 530 U.S. at 372; *see also English v. General Elec. Co.*, 496 U.S. 72, 79 n5, 110 L. Ed. 2d 65, 110 S. Ct. 2270 (1990) (recognizing that these categories are not "rigidly distinct"). The Court has not established a similar detailed framework for courts to utilize when analyzing preemption by treaties. *See, e.g., United States v. Belmont*, 301 U.S. 324, 331, 81 L. Ed. 1134, 57 S. Ct. 758 (1937) (noting, without any analysis, that treaties trump conflicting state laws). The Court has stated, however, that this preemption framework should not be applied "mechanically" when construing whether a treaty or international agreement preempts a state law because "the nation-state, not subdivisions within one nation, is the focus of the [treaty] and the perspective of our treaty partners." *See El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 175, 142 L. Ed. 2d 576, 119 S. Ct. 662 (1999). In order to determine whether a treaty trumps state law, therefore, the court should assess the language of the treaty and "give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties." *Id.* at 167 (quoting *Air France v. Saks*, 470 U.S. 392, 399, 84 L. Ed. 2d 289, 105 S. Ct. 1338 (1985)). The court must "be governed by the text – solemnly adopted by the governments of many separate nations – whatever conclusions might be drawn from the intricate drafting history that [exists]." *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134, 104 L. Ed. 2d 113, 109 S. Ct. 1676 (1989).

With these principles in mind, the court looks first to Article 14(b) for an expression of the treaty's intent. As previously noted, this provision bars the claims of signatory nations and their nationals arising out of Japan's

actions in the Second World War. *See In re World War II*, 114 F. Supp. 2d at 944-45. To be sure, the signatory nations desired complete termination of all claims against Japan, but Article 14(b) has no effect on the claims of nationals from non-signatory nations. Hence, although from a perspective of 2001 it may seem anomalous for the United States to negotiate a treaty that bars the claims of its own nationals without a provision that forecloses resort to a judicial forum in the United States by nationals of non-signatory nations, Article 14(b) contains no express limitation against claims of non-signatory nationals. Little should be read into this omission, which most likely can be explained by the inconceivability a half century ago of such claims by non-signatory nationals being pursued in United States courts.

Other relevant provisions of the treaty suggest that the treaty does not address claims of non-signatory nationals. Specifically, article 4(a), which addressed Japan's post-war relationship with Korea, provides:

> The disposition of property of Japan and of its nationals * * * and their claims, including debts, against [Korea], and the disposition in Japan of property of [Korean] authorities and residents, and of claims, including debts, of [Korean] authorities and residents against Japan and its nationals, shall be the subject of special arrangements between Japan and such authorities.

Treaty at 3173. Similarly, with respect to China, article 26 provides:

> Japan will be prepared to conclude with any State * * * which is not a signatory of the present Treaty, a bilateral Treaty of Peace on the same or

> substantially the same terms as are provided for in the present Treaty * * *.

Id. at 3190. These provisions suggest that the treaty contemplates resolution of war claims with Korea and China through agreements separate and distinct from the Treaty of Peace with Japan and separate agreements necessarily create the possibility that the terms for resolving those claims may differ from the terms of the treaty entered into by the Allied nations. The fact that the signatory nations encouraged such agreements does not show an intent to occupy the field of non-signatory nations' claims through the treaty. *See, e.g., Trojan Technologies, Inc. v. Commonwealth of Pennsylvania*, 916 F.2d 903, 906-07 (3d Cir 1990) (refusing to find that an international free trade agreement preempted a state buy-American statute, in part, because the language in the agreement was "hortatory rather than mandatory"). Whether the agreements subsequently entered by Japan with Korea and China eliminated the claims of these non-signatory nations does not bear on whether the Treaty of Peace with Japan preempts claims of Chinese and Korean nationals. The court reads the language of articles 4(a) and 26 to suggest only that the signatory nations, including the federal government of the United States, did not intend the Treaty of Peace with Japan to control claims of individuals from non-signatory nations.

To the extent section 354.6 provides a cause of action to such individuals, therefore, it does not conflict with the expressed intent of the treaty. Accordingly, the treaty itself does not trump the California law in this respect.

B.

Simply because the claims of the Korean and Chinese plaintiffs derived from section 354.6 are not preempted by the Treaty of Peace with Japan does not mean that they can go forward, however. Providing a cause of action for these individuals triggers significant constitutional questions. Section 354.6 is unconstitutional because it infringes on the exclusive foreign affairs power of the United States.

Relative to many of the federal government's powers, the contours of the foreign affairs power has been infrequently analyzed and even less frequently clarified. Nevertheless, the national government's exclusive authority to regulate the foreign affairs of the United States has long been recognized as a constitutional principle of broad scope. *See United States v Pink*, 315 U.S. 203, 233, 86 L. Ed. 796, 62 S. Ct. 552 (1942) ("Power over external affairs is not shared by the States; it is vested in the national government exclusively."); *Hines v. Davidowitz*, 312 U.S. 52, 63, 85 L. Ed. 581, 61 S. Ct. 399 (1941); *Belmont*, 301 U.S. at 331; *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318, 81 L. Ed. 255, 57 S. Ct. 216 (1936). "It follows that all state action, whether or not consistent with current foreign policy, that distorts the allocation of responsibility to the national government for the conduct of American diplomacy is void as an unconstitutional infringement on an exclusively federal sphere of responsibility." *Tribe*, §§ 4-5 at 656.

This principle, which prohibits state action that unduly interferes with the federal government's authority over foreign affairs derives from both the text and structure of the Constitution. The Constitution allocates power for external affairs to the legislative and executive branches of the

national government and simultaneously prohibits the states from engaging in activities that might interfere with the national government's exercise of these powers. To be sure, there is no clause in the Constitution that explicitly grants a "foreign affairs power" to the federal government. *See* L. Henkin, *Foreign Affairs and the United States Constitution* 14-15 (2d ed 1996) (hereinafter, Henkin). But a number of provisions, when read together, strongly imply that such authority was intended. *See* Harold G .Maier, *Preemption of State Law: A Recommended Analysis*, 83 Am J Int'l L 832, 832 (1989) (hereinafter, Maier) ("Neither the Articles of Confederation nor the Constitution provided for a general foreign affairs power. Nonetheless, there was never any real question that the United States would act as a single nation in the world community.").

Specifically, the Constitution provides that Congress possesses the authority "to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States," US Const art I, §§ 8, cl 1, "to regulate Commerce with foreign Nations," *id.*, cl. 3, and "to define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations," *id.*, cl. 10. In addition, while Congress is granted the power "to declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water," *id.*, cl. 11, the President is designated the "Commander in Chief of the Army and Navy of the United States," *id.*, art. II, §§ 2, cl. 1. The President also is given the authority to "make Treaties" and "appoint Ambassadors" with the "Advice and Consent of the Senate," *id.*, cl. 2, and to "receive Ambassadors and other public Ministers," *id.*, §§3.

With respect to the states, the Constitution directs that "no State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal" or, without the consent of Congress, "lay any Imposts or Duties on Imports or Exports" or "enter into any Agreement or Compact * * * with a foreign Power," or "engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay." *Id.* §§1, cl. 10.

These and other constitutional provisions evidence an intent on the part of the framers to grant paramount authority for foreign affairs to the political branches of the federal government, thereby necessitating the exclusion of intrusive efforts on the part of the states in foreign relations. The Federalist Papers bolster this interpretation. *See Hines*, 312 U.S. at 64 n9 ("The importance of national power in all matters relating to foreign affairs and the inherent danger of state action in this field are clearly developed in [the] Federalist papers * * *."). For example, James Madison wrote: "This class of powers forms an obvious and essential branch of the federal administration. If we are to be one nation in any respect, it clearly ought to be in respect to other nations." The Federalist No 42, at 264 (C Rossiter ed 1961). Similarly, Alexander Hamilton argued, albeit with respect to the related but explicit foreign commerce power of the national government, that

> [t]he interfering and unneighborly regulations of some States, contrary to the true spirit of the Union, have, in different instances, given just cause of umbrage and complaint to others, and it is to be feared that examples of this nature, if not restrained by a national control, would be multiplied and extended till they became not less serious sources of animosity and discord than injurious

> impediments to the intercourse between the different parts of the Confederacy.

The Federalist No 22, at 144-45 (C Rossiter ed 1961). And as noted in *Hines*, "Thomas Jefferson, who was not generally favorable to broad federal powers, expressed a similar view in 1787: 'My own general idea was, that the States should severally preserve their sovereignty in whatever concerns themselves alone, and that whatever may concern another State, or any foreign nation, should be made a part of the federal sovereignty.'" *Hines*, 312 U.S. at 64 n11 (quoting *Memoir, Correspondence and Miscellanies from the Papers of Thomas Jefferson* (1829), vol 2, p 230, letter to Mr Wythe).

The Supreme Court has long acknowledged the federal government's broad authority over foreign affairs. In 1937, for example, Justice Sutherland noted that complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states." *Belmont*, 301 U.S. at 331. Similarly, Justice Black observed a few years later that "our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference." *Hines*, 312 U.S. at 63. To be certain, the holdings of these and other decisions from the same time period were predominantly based on the supremacy of federal law; the Court determined that the state legislation at issue in these cases was preempted by existing federal law or international agreements. But the early observations contained in these cases regarding the national government's broad authority over foreign affairs

are instructive because they describe the principles upon which the Supreme Court later relied in *Zschernig v. Miller*, 389 U.S. 429, 19 L. Ed. 2d 683, 88 S. Ct. 664 (1968), to announce the foreign affairs doctrine that governs the case at bar.

In *Zschernig*, the Supreme Court observed that the Constitution entrusts "the field of foreign affairs * * * to the President and the Congress." *Id.* at 432 (citing *Hines*, 312 U.S. at 63). The Court concluded that, as a result, the Constitution itself excludes state intrusion on the federal government's authority over foreign affairs even when the federal branches have not acted. *Id.* at 432, 441; *see also Henkin* at 164. Pointing to the broad principle articulated in *Hines*, the Court stated that "even in the absence of a treaty [or other federal law], a State's policy may disturb foreign relations. * * * If there are to be such restraints, they must be provided by the Federal Government." *Zschernig*, 389 U.S. at 441. In short, the Court concluded that state statutes "must give way if they impair the effective exercise of the Nation's foreign policy." *Id.* at 440.

Zschernig involved an Oregon probate statute that conditioned the inheritance rights of an alien not residing in the United States on his ability to prove that American heirs would have a reciprocal right to inherit estates in the foreign country and that he would receive payments from the Oregon estate "without confiscation, in whole or in part, by the governments of such foreign countries." *Id.* at 430. The Supreme Court noted that it had earlier refused to invalidate a similar statute enacted by California "on its face" because that statute "would have only 'some incidental or indirect effect in foreign countries.'" *Id.* at 432-33 (quoting *Clark v. Allen*, 331 U.S. 503, 517, 91 L. Ed. 1633, 67 S. Ct. 1431 (1947)). In *Zschernig*, however, the Court

assessed "the manner of [the Oregon statute's] application" and observed that the law had compelled state courts to "launch[ ] inquiries into the type of governments that obtain in particular foreign nations." 389 U.S. at 434. The Court noted, for example, that the statute triggered assessments of "the actual administration of foreign law" and "the credibility of foreign diplomatic statements." *Id.* at 435. In short, the statute "seemed to make unavoidable judicial criticism of nations established on a more authoritarian basis than our own." *Id.* at 440. Looking at these effects of the Oregon statute, the Court concluded that it was unconstitutional because it "affected international relations in a persistent and subtle way," had a "great potential for disruption or embarrassment" and triggered "more than 'some incidental or indirect effect in foreign countries.'" *Id.* at 434-35, 440.

Zschernig thus stands for the proposition that states may legislate with respect to traditional state concerns, such as inheritance and property rights, even if the legislation has international implications, but such conduct is unconstitutional when it has more than an "incidental or indirect effect in foreign countries." *Id.* at 440. As the First Circuit recently stated, under *Zschernig* "there is a threshold level of involvement in and impact on foreign affairs which the states may not exceed." *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 49-57 (1st Cir 1999), *aff'd on other grounds sub nom., Crosby v. National Foreign Trade Council*, 530 U.S. 363, 147 L. Ed. 2d 352, 120 S. Ct. 2288 (2000). Or, as the Third Circuit has summarized the doctrine, if a state law were to "involve[ ] the state in the actual conduct of foreign affairs[, the statute] is unconstitutional." *Trojan*, 916 F.2d at 913 (citing *Pink*, 315 U.S. 203, 62 S. Ct. 552, 86 L. Ed. 796).

This doctrine makes sense because the nation as a whole is affected when state-driven foreign policy has an impact on other countries. *See* Lori A Martin, *The Legality of Nuclear Free Zones*, 55 U Chi L Rev 965, 993 (1988). Indeed, for that very reason states have inadequate incentive to consider the effects of their actions on foreign relations. *See id. Zschernig* thus enables the courts to ensure that the states have not overstepped the line at the risk of endangering the nation as a whole.

Before evaluating section 354.6 in this regard, the court rejects the Korean and Chinese plaintiffs' suggestion that *Zschernig* is no longer valid. To be sure, some commentators have suggested that the reach of the Court's holding in *Zschernig* should be limited. *See, e.g., Henkin* at 165 n**; Curtis A Bradley & Jack L Goldsmith, *Customary International Law: A Critique of the Modern Position*, 110 Harv L Rev 815, 865 (1997); Jack L Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 Va L Rev 1617, 1698-1706 (1997); Peter J Spiro, *The States and Immigration in an Era of Demi-Sovereignties*, 35 Va J Int'l L 121, 161-74 (1994); but see Tribe §§4-5 at 656-57; *Maier* at 832-33. But *Zschernig* has not been overruled, and thus the constitutional principles it enunciates remain the law. *See Natsios*, 181 F.3d at 59 ("There is simply no indication, in * * * any * * * post-*Zschernig* case, that *Zschernig* is not good law and is not binding on us."). California and all states enacting legislation touching upon foreign affairs are thus bound by the doctrines of *Zschernig* until the Supreme Court instructs otherwise. As the Ninth Circuit has noted on numerous occasions, "speculation" about the continuing vitality of Supreme Court precedent "does not permit us to ignore [such] controlling * * * authority." *United States v. Pacheco-Zepeda*, 234 F.3d 411, 414 (9th

Cir 2001) (citing *Agostini v. Felton*, 521 U.S. 203, 237, 138 L. Ed. 2d 391, 117 S. Ct. 1997 (1997) (directing that lower courts should leave to the Supreme Court "the prerogative of overruling its own decisions") (citation omitted)); *see also Montana Chamber of Commerce v. Argenbright*, 226 F.3d 1049, 1057 (9th Cir 2000) (citing *Agostini* and noting same); *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1192 (9th Cir 1998) (same).

Indeed, on two recent occasions the Ninth Circuit has recognized the continuing vitality of *Zschernig*. *See Gerling Global Reinsurance Corp of America v. Low*, 240 F.3d 739, 751-53 (9th Cir 2001); *Int'l Assoc. of Indep. Tanker Owners v. Locke*, 148 F.3d 1053, 1068 (9th Cir 1998), *rev'd on other grounds sub nom. United States v. Locke*, 529 U.S. 89, 146 L. Ed. 2d 69, 120 S. Ct. 1135 (2000). In *Tanker Owners*, the Ninth Circuit rejected an argument that oil regulations promulgated by the state of Washington were unconstitutional under *Zschernig* because the litigant "failed to demonstrate that, even if those regulations [had] some extraterritorial impact, that impact [was] more than 'incidental or indirect.'" *Tanker Owners*, 148 F.3d 1069 (quoting *Zschernig*, 389 U.S. at 434). The decision affirms, therefore, that when a litigant makes a showing that the statute at issue triggers "more than 'some incidental or indirect effect in foreign countries,'" the statute is unconstitutional as an intrusion on the federal government's foreign affairs power. *See id.* (quoting *Zschernig*, 389 U.S. at 434).

Similarly, in *Gerling*, although the Ninth Circuit declined to apply *Zschernig* to California's Holocaust Victim Insurance Relief Act of 1999 (HVIRA), Cal. Ins. Code §§§§13800-13807, *see Gerling*, 240 F.3d at 753, the court did not suggest that *Zschernig* is no longer valid.

Rather, the court concluded that the HVIRA did not trigger the concerns implicated by the statutes in *Zschernig* and cases applying its doctrine. *See id.* The court stated that it "hesitated to apply *Zschernig* to a facial challenge to state statutes involving 'foreign affairs' (a) but that mainly involved foreign commerce and (b) that [were] not directed at a particular country." *Id.* The court also suggested that it was hesitant to apply *Zschernig* because "there is no evidence that HVIRA would implicate the diplomatic concerns mentioned in *Zschernig*." *Id.* By implication, therefore, the Ninth Circuit would apply *Zschernig* to state statutes that do not regulate commerce, are directed at a particular country or implicate the diplomatic concerns present in *Zschernig*.

In addition, other courts have applied the principles of *Zschernig* to strike down state or local laws. *See, e.g.*, *Natsios*, 181 F.3d 38, 49-61 (finding that the Massachusetts Burma Law, which restricted the ability of Massachusetts and its agencies from purchasing goods or services from companies that did business with Burma (Myanmar), was unconstitutional, in part, as a "threat to [the] federal foreign affairs power"); *Tayyari v. New Mexico State University*, 495 F. Supp. 1365, 1376-79 (D NM 1980) (striking down a university's policy designed to "rid the campus of Iranian students" because it conflicted with a federal regulation and "frustrated the exercise of the federal government's authority to conduct the foreign relations of the United States"); *Springfield Rare Coin Galleries v. Johnson*, 115 Ill. 2d 221, 503 N.E.2d 300, 305-07, 104 Ill. Dec. 743 (Ill 1986) (invalidating an Illinois statute that excluded South Africa from a tax exemption as more than an "incidental" intrusion on the federal government's foreign affairs power); *New York Times Co v.*

City of New York Commission on Human Rights, 41 N.Y.2d 345, 361 N.E.2d 963, 969, 393 N.Y.S.2d 312 (NY 1977) (striking down a New York City antidiscrimination statute because it "interfered with the foreign policy authority of the Federal Government"); *Bethlehem Steel Corp v. Board of Commissioners*, 276 Cal. App. 2d 221, 227-29, 80 Cal. Rptr. 800 (1969) (invalidating a California Buy American statute because it had "more than 'some incidental effect in foreign countries' and * * * great potential for disruption * * *.").

The infrequency with which *Zschernig* has been applied over the years does not suggest a weakening in the doctrine. To the contrary, it shows that the federal government has affirmatively enacted legislation or international agreements in most areas of foreign relations that expressly preempt conflicting state and local legislation under the Constitution's Supremacy clause, thereby obviating the need for analysis under *Zschernig*. *See, e.g.*, *Crosby*, 530 U.S. 363, 147 L. Ed. 2d 352, 120 S. Ct. 2288 (affirming invalidity of the Massachusetts Burma law on preemption grounds). It also suggests that, despite several high profile examples of international involvement, state and local authorities tend to focus on state and local issues. *See* Howard N Fenton III, *The Fallacy of Federalism in Foreign Affairs: State and Local Foreign Policy Trade Restrictions*, 13 Nw J Int'l L & Bus 563, 564 (1993). Indeed, most actions by states and municipalities that directly address foreign policy issues do not raise the type of diplomatic concerns expressed by the Court in *Zschernig*. For example, local authorities seeking to make international statements often enact non-binding resolutions or form sister-city relationships with foreign communities.

See id. Section 354.6 represents a much greater foray into the field of foreign affairs.

Turning to an analysis of section 354.6, the court reiterates that under *Zschernig*, California may legislate with respect to local concerns that touch upon foreign affairs, but only if its actions have just "some incidental or indirect effect in foreign countries." *Zschernig*, 389 U.S. at 433 (quoting *Clark*, 331 U.S. at 517). The court concludes that section 354.6, as applied to defendants here, clearly crosses this "forbidden line." *See Clark*, 331 U.S. at 517.

The court's conclusion is mandated by the following observations: (1) the terms of section 354.6 and its legislative history demonstrate a purpose to influence foreign affairs directly, (2) the statute targets particular countries, (3) the statute does not regulate an area that Congress has expressly delegated to states to regulate, (4) the statute establishes a judicial forum for negative commentary about the Japanese government and Japanese companies, (5) the Japanese government asserts that litigation of these claims could complicate and impede diplomatic relationships of the countries involved, and (6) the United States, through the State Department, contends that section 354.6 impermissibly intrudes upon the foreign affairs power of the federal government.

First, the language of section 354.6 and the contemporaneous comments of its creators demonstrate that the statute embraces a foreign policy purpose, namely, to provide a mechanism for individuals to obtain war-related reparations. By its terms, the statute purports to enable individuals from any country forced to labor during World War II by the Japanese government or Japanese companies "to recover compensation" for such labor. *See* Cal.

CCP §§354.6(b). Moreover, as the notes to the statute indicate, the legislature determined that the "victims of Nazi [and Japanese] persecution have been deprived of their entitlement to compensation [earned] during the Second World War." *Id.*, note §§1(b). Indeed, Governor Gray Davis stated shortly after signing the bill that the law would "help right a historic wrong which occurred over 50 years ago during World War II when men, women and children were forced into slave labor." *See* Henry Weinstein, *Bill Signed Bolstering Holocaust-Era Claims*, LA Times, July 29, 1999, at A3. The author of the measure, Senator Tom Hayden, similarly asserted at the time:

> [Section 354.6] sends a very powerful message from California to the U.S. government and the German government, who are in the midst of rather closed negotiations about a settlement. * * * If the international negotiators want to avoid very expensive litigation by survivors as well as very bad public relations for companies like Volkswagen and Ford, they ought to settle. * * * Otherwise, this law allows us to go ahead and take them to court.

Id. Since the statute purports to create a cause of action for compensation from companies related to "the Nazi regime, its allies or sympathizers," it cannot be doubted that the same message is intended for the Japanese government and Japanese corporations.

These issues and determinations which underlie section 354.6 are thus identical to the "uniquely federal" reparations concerns that were addressed by the United States while negotiating the Treaty of Peace with Japan. *See In re World War II*, 114 F. Supp. 2d at 946; *see also Ware v. Hylton*, 3 U.S. (3 Dall) 199, 230, 1 L.Ed. 568

(establishing that the war-related claims of individual citizens can only be brought by their government); *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248, 273-74 (D NJ 1999) (noting same). By establishing California courts as an avenue for reparations, therefore, section 354.6 engages California in the uniquely federal foreign policy function of addressing claims for reparations that arise in the aftermath of a war.

Second, section 354.6 targets particular countries by allowing a cause of action against companies that transacted business in any of the areas occupied by "the Nazi regime, its allies or sympathizers." *See* Cal. CCP §§354.6. Because the statute singles out such a narrow set of countries – most notably, Germany and Japan – it suggests that California intended the statute to send an explicit foreign relations message, rather than simply to address some local concern.

As a contrast, in *Trojan* the Third Circuit upheld a Pennsylvania "Buy American" law, in part, because "the statute applied to steel from ***any*** foreign source, without respect to whether the country might be considered friend or foe." *Trojan*, 916 F.2d at 913 (emphasis added). By not singling out a particular country or set of countries, the Pennsylvania statute implicitly focused on a local concern (the local steel industry), as opposed to engaging in international relations directly with a particular country or set of countries.

The Korean and Chinese plaintiffs point out that the Ninth Circuit referred to this characteristic of the law in *Trojan* when assessing the applicability of *Zschernig* to the HVIRA, implying that this court should do the same with respect to section 354.6. *Gerling*, 240 F.3d at 752-53. As

discussed, the *Gerling* court was hesitant to apply *Zschernig*, in part, because the HVIRA was not directed at a particular country. *Id.* at 753. But, in this regard, section 354.6 is significantly different from the HVIRA. While section 354.6 is aimed at a few specific countries, the HVIRA applied to insurers from any country. *See* Cal. Ins, Code §§13804(a) ("Any insurer * * * that sold * * * insurance policies * * * to persons in Europe, which were in effect between 1920 and 1945 [must file certain information with the insurance commissioner].") (emphasis added). Thus, the *Gerling* court's reliance on this observation in *Trojan* to minimize the foreign affairs effect of the HVIRA suggests the opposite conclusion for section 354.6.

With respect to this point, therefore, section 354.6 is closer to the statute struck down by the Supreme Court in *Zschernig*. The Oregon statute at issue was generally applied only against residents of a narrow set of countries (those "established on a more authoritarian basis than our own"); section 354.6 similarly applies only against companies of a narrow set of countries. Indeed, section 354.6 targets an even smaller set of countries than the law at issue in *Zschernig*. The California law's focus on a few particular countries, therefore, further evidences an intrusion by the state on the field of foreign affairs.

Third, section 354.6 does not regulate an area that Congress has expressly delegated to the states. In fact, by establishing a mechanism for forced labor victims to obtain war reparations, the statute relates to a subject that has always been addressed at the federal level. To the contrary, the HVIRA regulates insurance companies, which, as the *Gerling* court noted, has been deemed by the Supreme Court to be "a local matter." *Gerling*, 240 F.3d at 744 (citing *FTC v. Travelers Health Ass'n.*, 362 U.S. 293,

302, 80 S. Ct. 717, 4 L. Ed. 2d 724 (1960)). At bottom, therefore, the "HVIRA is a California insurance regulation of California insurance companies * * *." 240 F.3d at 746. The Ninth Circuit's hesitancy to apply *Zschernig* to a constitutional challenge of the HVIRA because the law regulated an area of commerce for which Congress had expressly delegated the regulatory power to the states is thus irrelevant to the court's analysis here. Accordingly, section 354.6 cannot be validated as a regulation of a local concern in the same manner as the HVIRA. The Korean and Chinese plaintiffs do not contend otherwise.

Fourth, because section 354.6 opens the door to lawsuits about the conduct of the Japanese government and Japanese companies during the Second World War, the primary dangers of the Oregon statute that concerned the Court in *Zschernig* are likewise triggered here. Specifically, such litigation cannot be carried to fruition without making "unavoidable judicial criticism" of the efforts of Japan and its war industry. *See Zschernig*, 389 U.S. at 440. To be sure, the commentary would by necessity focus on the past, but, particularly given the fact that it would emanate from the official forum of American courts, Japan's current regime could not avoid being negatively implicated by association. It seems beyond doubt, therefore, that the statute has the potential to have an impact on foreign relations between the United States and Japan "in a persistent and subtle way." *See id.*

Fifth, and related to the court's fourth observation, the Japanese government has made clear that it is concerned about the effects of section 354.6 on Japan's relationship with the United States. *See* Views of the Government of Japan, United States SOI (Doc # 302), Exh 1. In a submission to this court by the Embassy of Japan,

the Japanese government points out that the claims of the Korean and Chinese plaintiffs have already been settled or are in the process of being settled through diplomatic negotiations between Japan, China, and North and South Korea. *See id.* at 5. California's efforts to provide an alternative forum for these claims interferes with Japan's diplomatic efforts and credibility in this regard. As Japan states:

> Permitting plaintiff's claims will put the courts in the United States in an unwarranted place to inevitably affect relations between the countries concerned, including the bilateral settlement reached after highly political and sensitive negotiations. Such involvement of the courts in the United States could complicate and impede relationships between Japan and those countries as well as the bilateral relationship between the United States and Japan. The Government of Japan is convinced that these issues should not be adjudicated in the courts in the United States.

Id. To be sure, the court recognizes that Japan has a financial interest in repressing any demands for further compensation against its nationals arising out of the war. But Japan's submission nevertheless serves as a reminder that the United States also has its own interest in maintaining normal diplomatic relations with Japan. The protests of the Japanese government thus demonstrate that section 354.6 has "great potential for [causing] disruption or embarrassment" here in the United States. *See Zschernig*, 389 U.S. at 435.

Finally, the federal government, as represented by the State Department, agrees with defendants that section 354.6 impermissibly intrudes on the foreign affairs power

of the federal government. *See* United States SOI (Doc # 302) at 12-16. The State Department represents one of the two political branches with the exclusive authority to handle the country's foreign affairs, and thus it is in a good position (and certainly better position than this court) to determine if that power has been intruded upon. In this regard, the government asserts:

> By enacting the statute, California has created its own policy in a particular area of foreign relations – one which judges the activities of foreign governments and corporations during * * * World War II, and the treaties and agreements Japan and other nationals made in the wake of the war. If each state were free to impose burdens that diverge from the foreign policy interests of the nation as a whole as expressed by the President and to have its own foreign policy, it would * * * significantly diminish the President's "economic and diplomatic leverage" and, hence, his authority to negotiate agreements with foreign governments.

Id. at 16 (citation omitted). The court finds it notable that the Supreme Court concluded that application of the law at issue in *Zschernig* was unconstitutional even though the federal government had submitted an amicus curiae brief in which it stated that "the government does not * * * contend that the application of the * * * statute in the circumstances of this case unduly interferes with the United States' conduct of foreign relations." *Zschernig*, 389 U.S. at 434-35. Section 354.6, to the contrary, has triggered the opposite reaction from the federal government. Accordingly, the concerns of the State Department further persuade the court to conclude that an application of

section 354.6 to defendants here cannot pass constitutional muster.

The few arguments of the Korean and Chinese plaintiffs in opposition to this conclusion are unpersuasive.

First, the Korean and Chinese plaintiffs make much of the distinction between facial and as applied challenges to the constitutionality of a statute. Specifically, they argue that *Zschernig*, which the Court framed as an as-applied analysis, cannot govern the present inquiry because defendants have challenged the validity of section 354.6 on its face. *See* Pl. Supp. Br. (Doc #323) at 6-7. But the Korean and Chinese plaintiffs are simply incorrect; defendants, in fact, challenge section 354.6 as it applies to them. *See* Def. Supp. Br. (Doc #336) at 1. As the Court established long ago, the proper method for adjudicating the constitutionality of a statute is for the affected parties to challenge the statute at issue as applied to them. *See United States v. Raines*, 362 U.S. 17, 20-21, 4 L. Ed. 2d 524, 80 S. Ct. 519 (1960). In *Raines*, the Court made clear that "the very foundation of the power of the federal courts to declare Acts of Congress unconstitutional lies in the power and duty of those courts to decide cases and controversies properly before them." *Id.*; *see also United States v. Kurt*, 988 F.2d 73, 76 (9th Cir 1993) ("A defendant cannot claim a statute is unconstitutional in some of its reaches if the statute is constitutional as applied to him.") (citing *Raines*, 362 U.S. at 21-22); Richard H Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1324 (2000) (concluding that "there is no single distinctive category of facial, as opposed to as-applied, litigation. Rather, all challenges to statutes arise when a particular litigant claims that a particular statute cannot be applied against her.").

To be sure, both the Supreme Court and the Ninth Circuit have cited this distinction as a factor influencing their analyses under the foreign affairs doctrine. *See Zschernig*, 389 U.S. at 433 (distinguishing *Clark*, in which the Court had refused to strike down a similar California statute, as addressing a challenge to the statute on its face); *Gerling*, 240 F.3d at 752 (noting that the HVIRA was challenged on its face). But given the posture of the challenge to section 354.6 brought by defendants, the court is not persuaded by the efforts of the Korean and Chinese plaintiffs to cloud the analysis here.

The Korean and Chinese plaintiffs also contend that because defendants are businesses, as opposed to foreign governments, section 354.6 does not implicate *Zschernig's* foreign affairs doctrine. *See* Pl. Supp. Br. (Doc #323) at 8. But such a contention does not square with their complaints, in which the Korean and Chinese plaintiffs emphasize that the conduct of the Japanese companies during the war was condoned and controlled by the Japanese government. *See, e.g., Sung* Compl., P 10 ("The Japanese government set up programs whereby Japanese companies (including defendants) could use civilian internees as slaves or forced laborers."); *Oh* Compl., PP 65, 67 ("In August 1936, Japanese Army General Minami Jiro was appointed Governor-General of Korea. Under his control private Japanese companies, including the Defendants, expanded those industries in Korea critical to Japan's war-making ability. * * * Japan enacted laws applicable to Korea forcing Koreans to labor in certain industries."). The Japanese government, as opposed to just these private defendants, is clearly implicated by the claims asserted under section 354.6 by the Korean and Chinese plaintiffs.

Even if these cases could somehow be characterized as claims between private parties, *Zschernig* clearly instructs that an application of state legislation that has more than "some incidental or indirect effect in foreign countries" is invalid. *See Zschernig*, 389 U.S. at 434 (emphasis added). Whether section 354.6 is applied to businesses or the Japanese government, the statute certainly has an effect in Japan.

Finally, the Korean and Chinese plaintiffs also suggest that since Congress has not addressed the subject matter here – forced labor compensation claims against Japanese companies – then there is no federal policy or legislation with which section 354.6 may conflict. *See* Pl. Supp. Br. (Doc #323) at 8. To be sure, this argument would be relevant if the court were analyzing whether section 354.6 violated the federal government's foreign commerce authority. *See Gerling*, 240 F.3d at 743-51. As already discussed, however, the foreign affairs doctrine prohibits state and local intrusion into the field of foreign relations regardless whether a conflicting federal law or policy exists. *See Tribe*, §§4-5 at 656 ("All state action, whether or not consistent with current federal foreign policy, that distorts the allocation of responsibility to the national government for the conduct of American diplomacy is void * * *."). It is the intrusion itself, which could inhibit the federal government's ability to "deal with those problems," that makes the application of such legislation unconstitutional. *See Zschernig*, 389 U.S. at 441. The federal government's actual policy, therefore, is irrelevant to the court's analysis.

Based on the foregoing observations, the court concludes that applying section 354.6 to defendants will "affect[ ] international relations in a persistent and subtle

way," have a "great potential for disruption or embarrassment" in the United States and trigger "more than some incidental or indirect effect" in Japan. *See Zschernig* at 434-35, 440. As a result, California's attempt to provide a cause of action to the Korean and Chinese plaintiffs against defendants is an unconstitutional intrusion on the exclusive foreign affairs power of the federal government.

III.

In light of the court's conclusion that the application of section 354.6 to defendants is unconstitutional, the Korean and Chinese plaintiffs may not rely on the California statute to pursue their claims against defendants. The Korean and Chinese plaintiffs contend, however, that they allege claims that arise under other statutes as well, namely the Alien Tort Claims Act (ATCA), 28 USC §§1350, and various California laws. The court addresses these claims now.

A.

The court turns first to the Korean and Chinese plaintiffs' purported claims under the ATCA. Although no reference is made to the ATCA in any of the seven complaints, the Korean and Chinese plaintiffs place extensive reliance on the statute and the few decisions interpreting it to oppose defendants' motions to dismiss.

The ATCA, originally enacted by the 1st Congress in the Judiciary Act of 1789, provides that

> [t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only,

> committed in violation of the law of nations or a treaty of the United States.

28 USC §§1350. In the Ninth Circuit, section 1350 provides both federal jurisdiction and a substantive right of action for certain violations of customary international law. *In re Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F.3d 1467, 1474-76 (9th Cir 1994) (Marcos II); *see also Alvarez-Machain v. United States*, 107 F.3d 696, 703 (9th Cir 1997). In order to state a claim under the ATCA, a plaintiff must allege (1) a claim by an alien, (2) asserting a tort (3) committed in violation of the law of nations (i e, international law). *See Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294, 1303 (CD Cal 2000). To be actionable under section 1350, an alleged violation must be of an international norm that is "specific, universal and obligatory." *See Marcos II*, 25 F.3d at 1475 (citing *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir 1980); *Tel-Oren v. Libyan Arab Republic*, 233 U.S. App. D.C. 384, 726 F.2d 774, 781 (DC Cir 1984)).

Defendants do not challenge that the elements for a claim under section 1350 have been satisfied here. With respect to the first two elements, most of the Korean and Chinese plaintiffs reside outside of the United States and the type of actions that defendants are alleged to have committed during the Second World War inflicted personal injuries that sound in tort. Regarding the third element, two of the seven complaints allege that the defendants forced the plaintiffs to labor without compensation in violation of their rights under international law. *See Kim* Compl., ¶¶76-79, 81; *Choe* Compl., ¶81.

Whether requiring individuals to engage in forced and slave labor meets the "specific, universal and obligatory

standard" required to violate the law of nations has not been specifically addressed by the Ninth Circuit. Cf. *Marcos II*, 25 F.3d at 1475 (finding that official torture violates the law of nations). To be sure, the Ninth Circuit has noted in passing that slavery violates a *jus cogens* norm. *United States v. Matta-Ballesteros*, 71 F.3d 754, 764 n5 (9th Cir 1995) (citing *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714-15 (9th Cir 1992)). Such norms are "nonderogable and peremptory, enjoy the highest status within customary international law, are binding on all nations, and can not be preempted by treaty." *Id.* (citation omitted). It remains unclear, however, whether all *jus cogens* norms meet the "specific, universal and obligatory standard" required to be actionable under section 1350.

Courts faced with making this determination may be guided by judicial decisions enforcing the law of nations, the work of jurists and the general usage and practice of nations. *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1383 (9th Cir 1998) (citing *Siderman*, 965 F.2d at 714-15); *see also United States v. Smith*, 5 Wheat. 153, 18 U.S. 153, 160-61, 5 L. Ed. 57 (1820). In this regard, a district court in New Jersey addressing forced labor claims under the ATCA against Ford Motor Company recently concluded that "the use of unpaid, forced labor during World War II violated clearly established norms of international law." *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 440 (D NJ 1999). As that court reasoned, this conclusion is supported by the following: (1) the Nuremberg Tribunals held that enslavement and deportation of civilian populations during the war constituted a crime against humanity in violation of international law, id (citing R Jackson, The Nuremberg Case xiv-xv (1971)); (2) the Nuremberg Principle IV(b) provides

that the "deportation to slave labor * * * of civilian populations of or in occupied territory" constitutes both a "war crime" and a "crime against humanity," *id.* (quoting Nuremberg Charter, annexed to the London Agreement on War Criminals, Aug 8, 1945, art 6, 59 Stat 1544, 82 UNTS 279); and (3) several American and German jurists have stated that conduct related to slave labor violates international law, id at 440-41 (citing *Handel v. Artukovic*, 601 F. Supp. 1421, 1426 n2 (CD Cal 1985); *Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir 1996); *Princz v. Federal Republic of Germany*, 307 U.S. App. D.C. 102, 26 F.3d 1166, 1180 (DC Cir 1994) (Wald, J, dissenting); *Siderman*, 965 F.2d at 715; *Tel-Oren*, 726 F.2d at 781 (Edwards, J, concurring); LG [District Court of Germany] Bremen, 1 0 2889/90 at 7 (1998) (FRG); *Krakauer v. Federal Republic of Germany*, LG [District Court of Germany] Bonn, 1 0 134792, at 21 (1997) (FRG), *rev'd on other grounds*, OLG [Court of Appeals] Cologne, 7 U 222/97 (1998) (FRG)).

Given the Ninth Circuit's comment in *Matta-Ballesteros*, 71 F.3d at 764 n5, that slavery constitutes a violation of *jus cogens*, this court is inclined to agree with the *Iwanowa* court's conclusion that forced labor violates the law of nations. Indeed, it seems beyond doubt that the forced labor practices of defendants during the Second World War violated traditional international law. But such conduct took place over 50 years ago. To the extent the Korean and Chinese plaintiffs have asserted claims under the ATCA for conduct taking place during World War II, the court concludes that the claims must be dismissed because they are time-barred.

Although the ATCA itself does not contain a statute of limitations, when a cause of action under federal civil law does not have a directly applicable limitations period, the

Supreme Court has instructed that the court should not assume that no time limit for the cause of action was intended. *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 158, 76 L. Ed. 2d 476, 103 S. Ct. 2281 (1983). Instead, the court must "borrow" the most suitable limitations period from some other source, traditionally, the law of the forum state. *Id.*; *see also* Wright & Miller, 19 *Federal Practice and Procedure* §§4519 at 595 (West Publishing Co 1996). Since "[s]tate legislatures do not devise their limitations periods with national interests in mind, and it is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies," however, the Supreme Court has recognized a narrow exception to the general rule that statutes of limitation are to be borrowed from state law. *Reed v. United Transportation Union*, 488 U.S. 319, 102 L. Ed. 2d 665, 109 S. Ct. 621 (1989) (quoting *Occidental Life Ins. Co. of California v. EEOC*, 432 U.S. 355, 367, 53 L. Ed. 2d 402, 97 S. Ct. 2447 (1977)). Specifically, the court should not borrow the state limitations period "when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking." *Id.* (quoting *DelCostello*, 462 U.S. at 172).

With these principles in mind, the court must identify the closest analogies to the ATCA from both state and federal law and determine which one presents the best analogy. *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1547 (ND Cal 1987); *see also Iwanowa*, 67 F. Supp. 2d at 462-63 (citing *Forti*); *Xuncax v. Gramajo*, 886 F. Supp. 162, 190-93 (D Mass 1995) (same). The Korean and Chinese plaintiffs

have brought their claims under the ATCA in an effort to obtain compensation from defendants for the damages caused by requiring them to engage in forced and slave labor during the Second World War. This effort closely resembles a personal injury suit, such as for false imprisonment, and thus the most analogous state laws are those providing personal injury causes of action for intentional torts. In California, such tort actions have a one year statute of limitations. *See* Cal. Civil Code §§340(3).

Locating the closest federal statute is a relatively straightforward task. In 1991, Congress enacted the Torture Victim Protection Act (TVPA) as a statutory note to the ATCA. *See* 28 USC §§1350, notes. The TVPA provides that any "individual who, under actual or apparent authority, or color of law, of any foreign nation * * * subjects an individual to torture * * * [or] extrajudicial killing shall, in a civil action, be liable for damages * * *." *Id.*, note §§ 2(a). Given the similarity between forced labor and torture – both of which, as noted above, the Ninth Circuit considers to be violations of *jus cogens* norms – combined with Congress' decision to incorporate the TVPA into the notes of the ATCA, the court concludes that the TVPA serves as the closest federal statute to the ATCA. The TVPA provides a ten year limitations period. 28 USC §§1350, note §§ 2(c).

In light of the fact that the TVPA is directed at conduct committed in foreign nations that violates customary international law (torture and extrajudicial killing), much like a cause of action under the ATCA would address, the court concludes that the TVPA is a much better analogy than state law. Indeed, the courts that have evaluated what limitations period should apply under the ATCA since the TVPA was enacted have reached the same

conclusion. *See, e.g., Iwanowa*, 67 F. Supp. 2d at 462; *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1195-96 (SD NY 1996); *Xuncax*, 886 F. Supp. at 192-93. Accordingly, the court concludes that the TVPA's ten year statute of limitations applies to the claims of the Korean and Chinese plaintiffs.

Federal law determines when a cause of action accrues and the statute of limitations begins to run. *Tworivers v. Lewis*, 174 F.3d 987, 991 (9th Cir 1999). Under federal law, a plaintiff's cause of action accrues "when the plaintiff knows or has reason to know of the injury which is the basis of the action." *Id.* Under this standard, the Korean and Chinese plaintiffs were aware of their injuries no later than when the war ended in 1945. These cases were initiated, however, in 1999 and 2000, over 50 years later and well outside the ten year limitations period.

Intertwined in the analysis of the timeliness of an action, of course, is whether the applicable statute of limitations has been tolled. When borrowing the limitations period from another federal statute, federal, rather than state, tolling doctrines apply. *See Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1199 (9th Cir 1988) (citing *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 466, 44 L. Ed. 2d 295, 95 S. Ct. 1716 (1975)); *see also* Wright & Miller, 19 *Federal Practice and Procedure* §§4519 at 627-33 (West Publishing Co 1996). As the Ninth Circuit has pointed out, the Senate Report on the TVPA states that the ten-year limitations period is subject to equitable tolling. *Hilao v. Estate of Marcos*, 103 F.3d 767, 773 (9th Cir 1996) (Marcos III) (citing S Rep No 249, 102d Cong, 1st Sess, at 11 (1991)). Such tolling may be triggered if the defendant has engaged in wrongful conduct, or extraordinary circumstances occurred outside of the plaintiff's

control, which prevented the plaintiff from asserting his claim during the limitations period. Id. At bottom, however, "one who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence." *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151, 80 L. Ed. 2d 196, 104 S. Ct. 1723 (1984); *see also Lehman v. United States*, 154 F.3d 1010, 1016 (9th Cir 1998), *cert denied*, 526 U.S. 1040, 143 L. Ed. 2d 500, 119 S. Ct. 1336 (1999) ("Equitable tolling * * * is not available to avoid the consequences of one's own negligence.").

None of the allegations in the Korean and Chinese plaintiffs' complaints suggest that they could not have attempted to bring these claims sooner. To be sure, the Ninth Circuit only formally recognized a right of action under the ATCA in 1994. *See Marcos II*, 25 F.3d at 1475. But the statute has been in force since the 18th century and several courts found it to provide a cause of action much earlier than the Ninth Circuit. *See, e.g., Abdul-Rahman Omar Adra v. Clift*, 195 F. Supp 857, 865 (D Md 1961) ("The wrongful acts were therefore committed in violation of the law of nations. And since they caused direct and special injury to the plaintiff, he may bring an action in tort therefor."); *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir 1980); *Tel-Oren v. Libyan Arab Republic*, 233 U.S. App. D.C. 384, 726 F.2d 774, 781 (DC Cir 1984); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1539 (ND Cal 1987).

The Korean and Chinese plaintiffs do not assert reasons why their claims could not have been brought under the ATCA within ten years of the war's end. Their reference to the Japanese government's alleged suppression of similar claims brought by Korean forced laborers in Japan shortly after the war does not explain why the same

claims could not have been alleged in a United States court. *See* Pl. Opp. Br. (Doc #254) at 26 n44. Moreover, to the extent the Korean and Chinese plaintiffs contend that they were not aware of the opportunity to bring these claims in the United States, "mere ignorance of the cause of action does not, in itself, toll the statute." *Volk, LA v. DA Davidson & Co*, 816 F.2d 1406, 1416 (9th Cir 1987).

The court concludes, therefore, that the ten year limitations period on the Korean and Chinese plaintiffs' international law claims under the ATCA has not tolled. Accordingly, to the extent such claims could have been asserted against defendants for their forced labor practices during the Second World War, they are barred by the statute of limitations.

B.

As previously noted, the Korean and Chinese plaintiffs also seek compensation and restitution under other California state laws. Specifically, among the seven complaints the Korean and Chinese plaintiffs allege the following state law claims: (1) false imprisonment; (2) assault and battery; (3) conversion; (4) unjust enrichment and quantum merit; (5) constructive trust; (6) accounting; (7) the Unfair Competition Act (UCA), Cal. Bus. & Prof. Code §§§§17200 *et seq*; and (8) violations of Article 1 of the California Constitution and Penal Code §§181, which prohibit involuntary servitude. To the extent the conduct of defendants during the Second World War would have been actionable under any of these California laws, they are also barred by the applicable statutes of limitations.

It has long been established that a federal court addressing state law claims generally "utilizes its own

state's statute of limitations." *Forsyth v. Cessna Aircraft Co.*, 520 F.2d 608, 613 (9th Cir 1975); *see also* Restatement Second, Conflict of Laws §§ 142. Because the forced labor underlying these claims occurred in China and Japan, a conflict of law question arises for which the court must look to the laws of the forum state, including its choice of law rules, to determine which statutes of limitations to apply. *See Guaranty Trust Co. of NY v. York*, 326 U.S. 99, 109-10, 89 L. Ed. 2079, 65 S. Ct. 1464 (1945); *Santana v. Holiday Inns, Inc.*, 686 F.2d 736, 737-38 (9th Cir 1982). California employs a "governmental interest" approach to choice of law questions, essentially requiring an analysis regarding the potential conflict between the statute of limitations in California and those applicable in China and Japan and, if a conflict exists, an assessment of the competing interests of the forums. *See In re Yagman*, 796 F.2d 1165, 1170 (9th Cir 1982). Such analysis is not necessary here, however, because the statutes of limitations from all three forums are significantly shorter than the age of these claims.

Under California law, the longest applicable statute of limitations, which relates to the UCA, is just four years. *See* Cal. Bus. & Prof. Code §§17208. All of the other state law claims asserted by the Korean and Chinese plaintiffs trigger a limitations period under California law between one to three years from the date the claims accrued. *See* Cal. CCP §§§§338, 339, 340. The Civil Code of Japan provides that claims lapse if not exercised within ten years. *See* The Civil Code of Japan, art 167 at FA 29 (Exhibits in Support of Motion to Dismiss (Doc #212), Exh Z). Under the law of China, the longest applicable statute of limitations is two years for civil suits. *See* Civil Law of

China, arts 135-37 (Exhibits in Support of Motion to Dismiss (Doc #212), Exh AA).

The Korean and Chinese plaintiffs do not contend that these statutes of limitations have been tolled. In fact, they appear to concede the futility of these state law claims by arguing exclusively that their claims are valid under section 354.6 and the ATCA. In support of this assessment, the court notes that the people of the state of California, through the office of the Attorney General, states that "absent [section 354.6, the plaintiffs] would be without a remedy * * *." Amicus Curiae Brief of the People of the State of California (Doc #101) at 1. Further buttressing this conclusion is the fact that district courts in Japan addressing similar claims have uniformly dismissed such actions, in part, because the applicable statutes of limitations have run. *See* Appeal to International Labour Organization Regarding Violation of Convention No 29 by Japan During Wartime (Pl. Appendix (Doc #14), Exh I) at 3.

To the extent the Korean and Chinese plaintiffs' complaints are based on these California statutes, therefore, the court concludes that they are time-barred.

IV.

For the foregoing reasons, the motions to dismiss and/or for judgment on the pleadings are GRANTED with respect to the actions involving the Korean and Chinese plaintiffs. The clerk shall enter judgment in the above-captioned cases, terminate all motions and close the files.

IT IS SO ORDERED.

September 17, 2001

VAUGHN R WALKER

United States District Judge

IN RE: WORLD WAR II ERA JAPANESE FORCED LABOR LITIGATION,

This Document Relates To:
Resus v. Mitsui & Co., Ltd., et. al., ND Cal. No. 00-3313;
Llanza v. Mitsui & Co. (USA), Inc., et. al.,
ND Cal. No. 00-3240;
Saldajeno v. Ishihara Sangyo Kaisha Ltd., et. al.,
ND Cal. No. 00-2960;
Santo Domingo v. Ishihara, ND Cal. No. 00-3828

Master File No. MDL-1347

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

The Honorable Vaughn R. Walker

164 F. Supp. 2d 1153; 2001 U.S. Dist. LEXIS 14641

September 17, 2001

ORDER NO. 9

In these consolidated actions, plaintiffs from various countries seek damages and other remedies from Japanese corporations for their forced labor during World War II. The four matters in the above caption represent the classes of Filipino plaintiffs. On September 21, 2000, the court dismissed the claims of plaintiffs who were United States or Allied soldiers in the war based on the court's conclusion that the 1951 Treaty of Peace with Japan constitutes a waiver of such claims. *In re World War II Era Japanese Forced Labor Litigation*, 114 F. Supp. 2d 939, 942 (ND Cal 2000) (Order No 4). Motions to dismiss brought by plaintiffs who were not members of the armed forces of the United States or its allies were not addressed by the order and remain pending with the court. The four matters involving Filipino plaintiffs were transferred to this court after the initial hearing on defendants' motions

to dismiss. As a result, defendants now move to dismiss and/or for judgment on the pleadings in the actions involving Filipino plaintiffs.

I.

The Filipino plaintiffs assert essentially the same claims as the other plaintiffs in these actions. Most notably, they seek compensation under California Code of Civil Procedure §§ 354.6, a law permitting an action by "any person who was a member of the civilian population conquered by the Nazi regime, its allies or sympathizers, or prisoner-of-war [of the same regimes] * * * [to] recover compensation for labor performed as a Second World War slave labor victim * * * from any entity or successor in interest thereof, for whom that labor was performed * * *." Cal CCP §§ 354.6. The Filipino plaintiffs also assert claims under California tort and common law, such as intentional infliction of emotional distress, conversion, unjust enrichment, constructive trust and unfair business practices prohibited by California Bus & Prof Code §§ 17200. One of the Filipino plaintiffs also asserts violations of the "law of nations."

Defendants argue that the claims of the four Filipino actions are barred by the Treaty of Peace with Japan for the same reasons the claims of the Allied POWs are barred. As noted in Order No 4, the treaty was signed at San Francisco on September 8, 1951, by the representatives of the United States and 47 other Allied powers and Japan. Treaty of Peace with Japan, [1952] 3 UST 3169, TIAS No 2490 (1951) (hereinafter, Treaty). The waiver provision in the treaty is Article 14(b). See id at 3183. In essence, that provision broadly waives "all" reparations

and "other claims" of the "nationals" of Allied powers "arising out of any actions taken by Japan and its nationals during the course of the prosecution of the war." Id. Defendants argue that the Philippines was an "Allied Power," and thus the claims of any of its nationals are barred. The key issue for the court to address, therefore, is whether the Philippines is an "Allied power" subject to the provisions of the treaty.

Article 25 of the treaty defines "Allied Powers" for the purposes of the treaty. *Id.* at 3190. In relevant part, that article provides that "the Allied Powers shall be the States at war with Japan, or any State which previously formed a part of the territory of a State named in Article 23, provided that in each case the State concerned has signed and ratified the Treaty." *Id.* The Philippines was an official signatory of the treaty. *Id.* at 3304. Article 23, which directs each signatory to ratify the treaty, specifically names the Republic of the Philippines. *Id.* at 3189. Indeed, the Philippines sent six representatives to the treaty negotiations to sign on behalf of the country: Carlos P Romulo, J M Elizalde, Vicente Francisco, Diosdado Macapagal, Emiliano T Tirona and V G Sinco. *Id.* The Philippines ratified the treaty on July 23, 1956, and deposited the ratification with the United States pursuant to Article 24 of the treaty. *See* M J Bowman and D J Harris, *Multilateral Treaties Index and Status* at 172 (Butterworths 1984) (Def Req for Judicial Notice (Doc # 200), Exh B). The treaty thus became effective in the Philippines on July 23, 1956. *Id.*

The Filipino plaintiffs do not dispute any of these facts. In fact, a professor submitting a declaration in support of their opposition explicitly states that "Article 14(b) is to be read as a waiver by the Phillippines [sic]

with respect to the claims of Filipino nationals 'arising out of any action taken by Japan and its nationals in the course of the prosecution of the war.'" Magallona Decl (Doc #249), ¶3.

In sum, because the Philippines is specifically named in Article 23 and the country both signed and ratified the treaty, under Article 25 the Philippines is an Allied power for purposes of the treaty. Treaty at 3190. The court finds, therefore, that for the reasons discussed in Order No 4, the Treaty of Peace with Japan bars the claims of the Filipino plaintiffs.

II.

In an effort to avoid the preclusive effect of the treaty, the Filipino plaintiffs put forth several unpersuasive arguments, several of which were likewise asserted by the Allied plaintiffs but rejected in Order No 4. In their first and most prominent argument, the Filipino plaintiffs assert that their claims do not arise out of conduct taken "in the prosecution of the war." Pl Opp Br (Doc #247) at 4-8. As the court noted in Order No 4, "it is particularly far-fetched to attempt to distinguish between the conduct of Imperial Japan during the Second World War and the major industry that was the engine of its war machine." *In re World War II*, 114 F. Supp. 2d at 948. The Filipino plaintiffs are asking the court to make that distinction.

The Filipino plaintiffs argue that their complaints are different from those in the Allied matters. Specifically, they contend that no facts are alleged which would permit the court to infer that defendants' conduct in the Philippines was taken in the course of the prosecution of the war. Pl. Opp. Br. (Doc #247) at 5. The court has reviewed

the four Filipino complaints and finds this argument to be seriously disingenuous.

Three of the four complaints are filled with allegations equating the actions of defendants with those of Japan's efforts to prosecute the war. For example, the *Llanza* complaint asserts that "the defendants, in collaboration and conspiracy with the Empire of Japan, developed plan [sic], scheme [sic] and/or common enterprises, through and by which the defendants enabled the Empire of Japan to conduct and execute the entire operations of World War II." *Llanza* compl, ¶64. The same complaint then asserts that "the Japanese government established programs whereby the Japanese companies could use the Filipino, and other allied civilians and POWs as slave or forced laborers * * * 'toward the prosecution of the Greater East Asiatic War.'" *Id.*, ¶72 (quoting the Japanese Prisoners of War Bureau). Similarly, the *Resus* complaint alleges that a "Japanese military government de facto ruled the [Philippines] until it was liberated in February 1945 * * * [and] appropriated ownership of non-Japanese owned industry and production which, in turn, commissioned or entrusted them to private Japanese companies including the defendants * * * [who] forced Filipinos to work as slave and forced laborers." *Resus* compl, ¶¶104-05 (emphasis in original). The *Saldajeno* complaint asserts that "one of Japan's major purposes * * * in occupying [the Philippines] was to exploit the * * * large deposits of copper, coal, manganese and iron – all resources that Japan badly needed for its wartime efforts." *Saldajeno* compl, ¶37.

The Filipino plaintiffs ignore these allegations and, instead, hang their argument on the *Santo Domingo* complaint only. That particular action was initiated after the court issued Order No 4. Consequently, the plaintiffs

in that matter have artfully attempted to plead around the Article 14(b) bar. The complaint alleges that "one of Defendants' * * * goals from 1941-1945 was to exploit the natural resources in the area, especially mining resources, for their self-interest, profit, and financial gain, and not for the prosecution of the war." *Santo Domingo* compl, ¶27. Assuming that defendants' intent was not to prosecute the war by operating their businesses with the help of forced labor, however, does not establish that Japan's intent in "transacting business" with such defendants was not to help ***Japan*** prosecute the war. *See id*, ¶39. As defendants correctly point out, the treaty unambiguously waives all Allied claims "arising out of any actions taken by Japan and its nationals ***in the course of*** the prosecution of the war" regardless whether defendants sought to prosecute the war or simply sought financial gain. *See* Treaty at 3183 (emphasis added). Indeed, the fact that the *Santo Domingo* plaintiffs assert a claim under California Code of Civil Procedure §§ 354.6 demonstrates that they seek compensation for injuries arising in the course of Japan's prosecution of the war. As stated above, it would be a stretch to attempt to distinguish between the conduct of Japan during the war and the companies that supported its war machine. Overall, therefore, the allegations of the Filipino complaints demonstrate that their actions are within the scope of the treaty's waiver.

The Filipino plaintiffs also put forth several arguments that, at bottom, contend waiver of their claims renders the treaty unconstitutional under Filipino constitutional law and invalid under the fundamental norms of international law. *See* Pl Opp Br (Doc #247) at 9-14. The court previously rejected similar arguments by the Allied plaintiffs. As stated in Order No 4, these arguments are

"contrary to the well-settled principle that the government may lawfully exercise its 'sovereign authority to settle the claims of its nationals against foreign countries.'" *In re World War II*, 114 F. Supp. 2d at 948 (quoting *Dames & Moore v. Regan*, 453 U.S. 654, 679-80, 69 L. Ed. 2d 918, 101 S. Ct. 2972 (1981); citing *Neri v. United States*, 204 F.2d 867, 868-69 (2d Cir 1953) (enforcing treaty waiver of reparations claims)). Whether waiver of the Filipino plaintiffs' claims violates the constitutional law of the Philippines (as opposed to American constitutional law) is beside the point. Treaties made under the authority of the United States, such as the Treaty of Peace with Japan, are "the supreme Law of the Land." US Const, Art VI. For challenges to such treaties brought in American courts, therefore, the relevant inquiry is whether the treaty complies with American law, not the law of another nation. As the Supreme Court concluded long ago:

> The treaty is therefore a law made by the proper authority, and the courts of justice have no right to annul or disregard any of its provisions, unless they violate the Constitution of the United States. It is their duty to interpret it and administer it according to its terms. And it would be impossible for the executive department of the government to conduct our foreign relations with any advantage to the country, and fulfil the duties which the Constitution has imposed upon it, if every court in the country was authorized to inquire and decide whether the person who ratified the treaty on behalf of a foreign nation had the power, by its constitution and laws, to make the engagements into which he entered.

Doe v. Braden, 57 U.S. 635, 657, 14 L. Ed. 1090 (1853). Hence, the laws of the Philippines are not relevant for the

court's analysis of a treaty made under the authority of the United States. *See id.*

The Filipino plaintiffs also argue that the waiver provision does not apply to them because the reparations agreement between Japan and the Philippines only releases Japan from claims to the extent of its payment of reparations. Pl Opp Br (Doc #247) at 18-19. Applying the terms of the reparations agreement to trump the waiver provision of the treaty strains logic and simply contradicts the unambiguous language of the reparations agreement. Specifically, the agreement releases Japan "from its reparations obligation" to the extent of Japan's payments under the agreement. *See* Reparations Agreement Between Japan and the Republic of the Philippines, Article 6 (Def Req for Judicial Notice (Doc #200), Exh C at 4). Hence, the passage cited by the Filipino plaintiffs in Article 6 merely releases Japan from its reparations obligations as they are paid. *Id* ("By and upon making a payment * * * Japan * * * shall be released from its reparations obligation to the extent of * * * such * * * payment."). The waiver provision in the treaty thus still applies.

Finally, the Filipino plaintiffs assert that the Alien Tort Claims Act (ATCA), 28 USC §§1350, provides the court with jurisdiction to hear the claims of the Filipino plaintiffs. See Pl Opp Br (Doc #247) at 19-20. To be sure, the act provides district courts with "original jurisdiction" over claims by aliens for torts "committed in violation of the law of nations or a treaty of the United States." 28 USC §§1350. But the court has already determined that federal subject matter jurisdiction exists for claims, such as these, that are based on the federal common law of foreign policy and relations. *In re World War II*, 114

F. Supp. 2d at 943-44. The Ninth Circuit's conclusion that the act also creates a cause of action for "violations of specific, universal and obligatory" norms under international law does not alter matters. *See In re Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir 1994) (citation omitted). The treaty precludes the claims of the Filipino plaintiffs regardless of the authority under which these claims are brought. Accordingly, the ATCA may enable this court to hear the Filipino plaintiffs' claims, but it does not eliminate the preclusive effect of the treaty.

For the foregoing reasons, defendants' motions to dismiss and/or for judgment on the pleadings are GRANTED with respect to the actions involving Filipino plaintiffs. The clerk shall enter judgment in the above-captioned cases.

IT IS SO ORDERED.

Dated:
September 17, 2001.

VAUGHN R WALKER

United States District Judge

IN RE: WORLD WAR II ERA JAPANESE FORCED LABOR LITIGATION,

This Document Relates To:
Alfano v. Mitsubishi Corp, CD Cal. No. 00-3174;
Corre v. Mitsui & Co., CD Cal. No. 00-999;
Eneriz v. Mitsui & Co., CD Cal. No. 00-1455;
Heimbuch, et. al. v. Ishihara Sangyo Kaisha, Ltd., ND Cal. No. 00-0064;
Hutchison v. Mitsubishi Materials Corp., CD Cal. No. 00-2796;
King v. Nippon Steel Corp., ND Cal. No. 99-5042;
Levenberg v. Nippon Sharyo, Ltd., ND Cal. No. 99-1554;
Levenberg v. Nippon Sharyo, Ltd., ND Cal. No. 99-4737;
Poole v. Nippon Steel Corp., CD Cal. No. 00-0189;
Price v. Mitsubishi Corp., CD Cal. No. 00-5484;
Solis v. Nippon Steel Corp., CD Cal. No. 00-0188;
Titherington v. Japan Energy Corp., CD Cal. No. 00-4383;
Wheeler v. Mitsui & Co., Ltd., CD Cal. No. 00-2057

Master File No. MDL-1347

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

The Honorable Vaughn R. Walker

114 F. Supp. 2d 939; 2000 U.S. Dist. LEXIS 13984

September 21, 2000

ORDER NO. 4

On December 23, 1941, after mounting a brave resistance against an overwhelming foe, the small American garrison on Wake Island in the South Pacific surrendered to Imperial Japanese forces. James King, a former United States Marine, was among the troops and civilians taken prisoner by the invaders. He was ultimately shipped to Kyushu, Japan, where he spent the remainder of the war

toiling by day as a slave laborer in a steel factory and enduring maltreatment in a prison camp by night. When captured, King was 20 years old, 5 feet 11 inches tall and weighed 167 pounds. At the conclusion of the war, he weighed 98 pounds.

James King is one of the plaintiffs in these actions against Japanese corporations for forced labor in World War II; his experience, and the undisputed injustice he suffered, are representative. King and the other plaintiffs seek judicial redress for this injustice.

I.

These actions are before the court for consolidated pretrial proceedings pursuant to June 5, 2000, and June 15, 2000, orders of transfer by the Judicial Panel on Multidistrict Litigation. On August 17, 2000, the court heard oral argument on plaintiffs' motions for remand to state court and defendants' motions to dismiss or for judgment on the pleadings.

This order addresses, first, all pending motions for remand. For the reasons stated below, the court concludes that notwithstanding plaintiffs' attempts to plead only state law claims, removal jurisdiction exists because these actions raise substantial questions of federal law by implicating the federal common law of foreign relations.

Second, the court addresses the preclusive effect of the 1951 Treaty of Peace with Japan on a subset of the actions before the court, namely, those brought by plaintiffs who were United States or allied soldiers in World War II captured by Japanese forces and held as prisoners of war.

The court concludes that the 1951 treaty constitutes a waiver of such claims.

This order does not address the pending motions to dismiss in cases brought by plaintiffs who were not members of the armed forces of the United States or its allies. Since these plaintiffs are not citizens of countries that are signatories of the 1951 treaty, their claims raise a host of issues not presented by the Allied POW cases and, therefore, require further consideration in further proceedings.

II.

Defendants may remove to federal court "any civil action brought in a State court of which the district courts of the United States have original jurisdiction." 28 USC §§1441(a). "The propriety of removal thus depends on whether the case originally could have been filed in federal court." *Chicago v. International College of Surgeons*, 522 U.S. 156, 163, 139 L. Ed. 2d 525, 118 S. Ct. 523 (1997).

Federal courts have original jurisdiction over cases "arising under the Constitution, laws or treaties of the United States." 28 USC §§1331. For purposes of removal, federal question jurisdiction exists "only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar Inc v Williams*, 482 U.S. 386, 392, 96 L. Ed. 2d 318, 107 S. Ct. 2425 (1987). Since a defense is not part of a plaintiff's properly pleaded statement of his claim, a case may not be removed to federal court on the basis of a federal defense. *Rivet v Regions Bank of La*, 522 U.S. 470, 475, 139 L. Ed. 2d 912, 118 S. Ct. 921 (1998).

Defendants' assertion of the Treaty of Peace with Japan as a defense to plaintiffs' state law causes of action does not, therefore, confer federal jurisdiction. Recognizing this, defendants rely on a line of cases committing to federal common law questions implicating the foreign relations of the United States.

In *Banco Nacional de Cuba v Sabbatino*, 376 U.S. 398, 425, 11 L. Ed. 2d 804, 84 S. Ct. 923 (1964), a case in which federal jurisdiction was based on diversity of citizenship, the Supreme Court held that development and application of the act of state doctrine was a matter of federal common law, notwithstanding the general rule of *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78, 82 L. Ed. 1188, 58 S. Ct. 817 (1938), that federal courts apply state substantive law in diversity cases. The court reasoned that because the doctrine concerned matters of comity between nations, "the problems involved are uniquely federal in nature." 376 U.S. at 424. Although the applicable state law mirrored federal decisions, the Court was "constrained to make it clear that an issue [involving] our relationships with other members of the international community must be treated exclusively as an aspect of federal law." *Id.* at 425.

Under *Banco Nacional*, federal common law governs matters concerning the foreign relations of the United States. *See Texas Indus, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641, 68 L. Ed. 2d 500, 101 S. Ct. 2061 (1981). "In these instances, our federal system does not permit the controversy to be resolved under state law, either because the authority and duties of the United States as sovereign are intimately involved or because the * * * international nature of the controversy makes it inappropriate for state law to control." *Id.*

If an examination of the complaint shows that the plaintiff's claims necessarily require determinations that will directly and significantly affect United States foreign relations, a plaintiff's state law claims should be removed. *Republic of Philippines v. Marcos*, 806 F.2d 344, 352 (2d Cir 1986). This doctrine has been extended to disputes between private parties that implicate the "vital economic and sovereign interests" of the nation where the parties' dispute arose. *Torres v. Southern Peru Copper Corp.*, 113 F.3d 540, 543 n8 (5th Cir 1997).

The court concludes that the complaints in the instant cases, on their face, implicate the federal common law of foreign relations and, as such, give rise to federal jurisdiction. Plaintiffs' claims arise out of world war and are enmeshed with the momentous policy choices that arose in the war's aftermath. The cases implicate the uniquely federal interests of the United States to make peace and enter treaties with foreign nations. As the United States has argued as amicus curiae, these cases carry potential to unsettle half a century of diplomacy.

After a thorough analysis, Judge Baird in the Central District of California denied remand in one of the cases now before the undersigned pursuant to the multidistrict litigation transfer order. *Poole v. Nippon Steel Corp.*, No 00-0189 (CD Cal March 17, 2000). The court agrees with the analysis and the conclusion in that case.[1] n1 Judge

[1] In another related case in which remand was granted, *Jeong Onoda Cement Co, Ltd*, 2000 U.S. Dist. LEXIS 7985 (CD Cal May 18, 2000) the court did not consider the federal common law of foreign relation as a basis for federal jurisdiction.

Baird held: "This case, on its face, presents substantial issues of federal common law dealing with foreign policy and relations. * * * As such, plaintiffs may not evade this Court's jurisdiction by cloaking their complaints in terms of state law." The motions for remand are DENIED.

III.

In addressing the motions to dismiss, the court refers again to a complaint that is representative of the actions by United States and Allied POWs, *King v. Nippon Steel Corp.*, No 99-5042.

As noted at the outset of this order, plaintiff King seeks redress for wrongs inflicted by his captors half a century ago. In count one of the complaint, he asserts a claim under California Code of Civil Procedure §§354.6, a new law that permits an action by a "prisoner-of-war of the Nazi regime, its allies or sympathizers" to "recover compensation for labor performed as a Second World War slave labor victim * * * from any entity or successor in interest thereof, for whom that labor was performed * * *." Cal Code Civ Pro §§354.6. Count two is an unjust enrichment claim in which plaintiff seeks disgorgement and restitution of economic benefits derived from his labor. In count three, plaintiff seeks damages in tort for battery, intentional infliction of emotional distress and unlawful imprisonment. Count four alleges that defendant's failure to reveal its prior exploitation of prisoner labor to present-day customers in California and elsewhere constitutes an unfair business practice under California Business and Professions Code §§17204.

Defendants move pursuant to Federal Rule of Civil Procedure 12(c) for a judgment on the pleadings, arguing:

(1) plaintiff's claims are barred by the Treaty of Peace with Japan; (2) plaintiff's claims raise nonjusticiable political questions; (3) the peace treaty, the War Claims Act of 1948 and the federal government's plenary authority over foreign affairs combine to preempt plaintiff's claims and (4) because the complaint alleges injuries caused by the Japanese government, plaintiff's claims are barred by the act of state doctrine and the Foreign Sovereign Immunities Act.

These arguments, and King's countervailing positions, arise in all of the cases before the court brought on behalf of Allied POWs against Japanese corporations. The court need not address all of them. For the reasons stated below, the court concludes that plaintiffs' claims are barred by the Treaty of Peace with Japan.

A.

A motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c) is the proper means to challenge the sufficiency of the complaint after an answer has been filed. Depending on the procedural posture of the individual case, some defendants have filed motions pursuant to FRCP 12(c) and others have filed motions to dismiss pursuant to FRCP 12(b). The distinction in the present context is not important. In the Ninth Circuit, the standard by which the district court must determine Rule 12(c) motions is the same as the standard for the more familiar motion to dismiss under Rule 12(b)(6): "A district court will render a judgment on the pleadings when the moving party clearly establishes on the face of the pleadings [and by evidence of which the court takes judicial notice] that no material issue of fact

remains to be resolved and that it is entitled to judgment as a matter of law." *Enron Oil Trading & Transp. Co v. Walbrook Ins. Co.*, 132 F.3d 526, 529 (9th Cir 1997) (citations omitted).

B.

The Treaty of Peace with Japan was signed at San Francisco on September 8, 1951, by the representatives of the United States and 47 other Allied powers and Japan. Treaty of Peace with Japan, [1952] 3 UST 3169, TIAS No 2490 (1951). President Truman, with the advice and consent of the Senate, ratified the treaty and it became effective April 28, 1952. *Id.*

Article 14 provides the terms of Japanese payment "for the damage and suffering caused by it during the war." *Id.* at Art 14(a). For present purposes, the salient features of the agreement are: (1) a grant of authority of Allied powers to seize Japanese property within their jurisdiction at the time of the treaty's effective date; (2) an obligation of Japan to assist in the rebuilding of territory occupied by Japanese forces during the war and (3) waiver of all "other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war * * *." *Id.* at Art 14(a)-(b) (emphasis added).

It is the waiver provision that defendants argue bars plaintiffs' present claims. In its entirety, the provision reads:

> b) Except as otherwise provided in the present Treaty, the Allied Powers waive all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of

> any actions taken by Japan and its nationals in the course of the prosecution of the war, and claims if the Allied Powers for direct military costs of occupation.

Id. at Art 14(b).

On its face, the treaty waives "all" reparations and "other claims" of the "nationals" of Allied powers "arising out of any actions taken by Japan and its nationals during the course of the prosecution of the war." The language of this waiver is strikingly broad, and contains no conditional language or limitations, save for the opening clause referring to the provisions of the treaty. The interests of Allied prisoners of war are addressed in Article 16, which provides for transfer of Japanese assets in neutral or enemy jurisdictions to the International Committee of the Red Cross for distribution to former prisoners and their families. *Id.* at Art 16. The treaty specifically exempts from reparations, furthermore, those Japanese assets resulting from "the resumption of trade and financial relations subsequent to September 2, 1945." *Id.* at Art. 14(a)(2)(II)(iv).

To avoid the preclusive effect of the treaty, plaintiffs advance an interpretation of Article 14(b) that is strained and, ultimately, unconvincing. Although the argument has several shades, it comes down to this: the signatories of the treaty did not understand the Allied waiver to apply to prisoner of war claims because the provision did not expressly identify such claims, in contrast to the corresponding Japanese waiver provision of Article 19. Article 19(b) states that the Japanese waiver includes "any claims and debts arising in respect to Japanese prisoners of war

and civilian internees in the hands of the Allied Powers * * *."

That the treaty is more specific in Article 19 does not change the plain meaning of the language of Article 14. If the language of Article 14 were ambiguous, plaintiffs' expressio unius argument would have more force. But plaintiffs cannot identify any ambiguity in the language of Article 14. To do so would be to inject hidden meaning into straightforward text.

The treaty by its terms adopts a comprehensive and exclusive settlement plan for war-related economic injuries which, in its wholesale waiver of prospective claims, is not unique. *See*, for example, *Neri v. United States*, 204 F.2d 867 (2d Cir 1953) (claim barred by broad waiver provision in Treaty of Peace with Italy). The waiver provision of Article 14(b) is plainly broad enough to encompass the plaintiffs' claims in the present litigation.

C.

The court does not find the treaty language ambiguous, and therefore its analysis need go no further. *Chan v. Korean Airlines*, 490 U.S. 122, 134, 104 L. Ed. 2d 113, 109 S. Ct. 1676 (1989) (if text of treaty is clear, courts "have no power to insert an amendment."). To the extent that Articles 19(b) raises any uncertainty, however, the court "may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Air France v. Saks*, 470 U.S. 392, 396, 84 L. Ed. 2d 289, 105 S. Ct. 1338 (1985). These authorities are voluminous and therefore of doubtful utility due to the potential for misleading selective citation. Counsel for both sides have proved themselves skilled

in scouring these documents for support of their positions, and that both sides have succeeded to a certain degree underscores the questionable value of such resort to drafting history. Nevertheless, the court has conducted its own review of the historical materials, and concludes that they reinforce the conclusion that the Treaty of Peace with Japan was intended to bar claims such as those advanced by plaintiffs in this litigation.

The official record of treaty negotiations establishes that a fundamental goal of the agreement was to settle the reparations issue once and for all. As the statement of the chief United States negotiator, John Foster Dulles, makes clear, it was well understood that leaving open the possibility of future claims would be an unacceptable impediment to a lasting peace:

> Reparation is usually the most controversial aspect of peacemaking. The present peace is no exception.
>
> On the one hand, there are claims both vast and just. Japan's aggression caused tremendous cost, losses and suffering. * * *
>
> On the other hand, to meet these claims, there stands a Japan presently reduced to four home islands which are unable to produce the food its people need to live, or the raw materials they need to work. * * *
>
> Under these circumstances, if the treaty validated, or kept contingently alive, monetary reparations claims against Japan, her ordinary commercial credit would vanish, the incentive of her people would be destroyed and they would sink into a misery of body and spirit that would make them easy prey to exploitation. * * *

> There would be bitter competition [among the Allies] for the largest possible percentage of an illusory pot of gold.

See US Dept of State, Record of Proceedings of the Conference for the Conclusion and Signature of the Treaty of Peace with Japan 82-83 (1951) (Def Req for Judicial Notice, Exh I).

The policy of the United States that Japanese liability for reparations should be sharply limited was informed by the experience of six years of United States-led occupation of Japan. During the occupation the Supreme Commander of the Allied Powers (SCAP) for the region, General Douglas MacArthur, confiscated Japanese assets in conjunction with the task of managing the economic affairs of the vanquished nation and with a view to reparations payments. *See* SCAP, Reparations: Development of Policy and Directives (1947). It soon became clear that Japan's financial condition would render any aggressive reparations plan an exercise in futility. Meanwhile, the importance of a stable, democratic Japan as a bulwark to communism in the region increased. At the end of 1948, MacArthur expressed the view that "the use of reparations as a weapon to retard the reconstruction of a viable economy in Japan should be combated with all possible means" and "recommended that the reparations issue be settled finally and without delay." Memorandum from General Headquarters of SCAP to Department of the Army (Dec. 14, 1948) at P 8 (Def Req for Judicial Notice, Exh E).

That this policy was embodied in the treaty is clear not only from the negotiations history but also from the Senate Foreign Relations Committee report recommending approval of the treaty by the Senate. The committee noted, for example:

> Obviously insistence upon the payment of reparations in any proportion commensurate with the claims of the injured countries and their nationals would wreck Japan's economy, dissipate any credit that it may possess at present, destroy the initiative of its people, and create misery and chaos in which the seeds of discontent and communism would flourish. In short, [it] would be contrary to the basic purposes and policy of * * * the United States * * *.

Japanese Peace Treaty and Other Treaties Relating to Security in the Pacific, S Rep No 82-2, 82d Cong, 2d Sess 12 (1952) (Def Req for Judicial Notice, Exh F). The committee recognized that the treaty provisions "do not give a direct right of return to individual claimants except in the case of those having property in Japan," *id.* at 13, and endorsed the position of the State Department that "United States nationals, whose claims are not covered by the treaty provisions * * * must look for relief to the Congress of the United States," *id.* at 14.

Indeed, the treaty went into effect against the backdrop of congressional response to the need for compensation for former prisoners of war, in which many, if not all, of the plaintiffs in the present cases participated. *See* War Claims Act of 1948, 50 USC §§ 2001-2017p (establishing War Claims Commission and assigning top priority to claims of former prisoners of war).

Were the text of the treaty to leave any doubt that it waived claims such as those advanced by plaintiffs in these cases, the history of the Allied experience in postwar Japan, the drafting history of the treaty and the ratification debate would resolve it in favor of a finding of waiver.

D.

As one might expect, considering the acknowledged inadequacy of compensation for victims of the Japanese regime provided under the treaty, the issue of additional reparations has arisen repeatedly since the adoption of that agreement some 50 years ago. This is all the more understandable in light of the vigor with which the Japanese economy has rebounded from the abyss.

The court finds it significant, as further support for the conclusion that the treaty bars plaintiffs' claims, that the United States, through State Department officials, has stood firmly by the principle of finality embodied in the treaty. This position was expressed in recent congressional testimony by Ronald J Bettauer, deputy legal advisor, as follows:

> The 1951 Treaty of Peace with Japan settles all war-related claims of the U.S. and its nationals, and precludes the possibility of taking legal action in United States domestic courts to obtain additional compensation for war victims from Japan or its nationals – including Japanese commercial enterprises.

POW Survivors of the Bataan Death March, Hearing before the Senate Committee on the Judiciary (June 28, 2000) (statement of Ronald J Bettauer, United States Department of State) (Def Req for Judicial Notice, Exh P).

In another recent example, in response to a letter from Senator Orrin Hatch expressing "disappointment" with the "fifty-five year old injustice imposed on our military forces held as prisoners of war in Japan" and urging the Secretary of State to take action, a State Department representative wrote:

> The Treaty of Peace with Japan has, over the past five decades, served to sustain U.S. security interests in Asia and to support peace and stability in the region. We strongly believe that the U.S. must honor its international agreements, including the [treaty]. There is, in our view, no justification for the U.S. to attempt to reopen the question of international commitments and obligations under the 1951 Treaty in order now to seek a more favorable settlement of the issue of Japanese compensation.
>
> This explanation obviously offers no consolation to the victims of Japanese wartime aggression. Regrettably, however, it was impossible when the Treaty was negotiated – and it remains impossible today, 50 years later – to compensate fully for the suffering visited upon the victims of the war * * * .

Letter of Jan 18, 2000, from US Dept of State to The Hon Orrin Hatch at 2.

The conclusion that the 1951 treaty constitutes a waiver of the instant claims, as stated above and argued in the brief of the United States as amicus curiae in this case, carries significant weight. *See Kolovrat v. Oregon*, 366 U.S. 187, 194, 6 L. Ed. 2d 218, 81 S. Ct. 922 (1961) ("While courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight."); *Sullivan v. Kidd*, 254 U.S. 433, 442, 41 S. Ct. 158, 65 L. Ed. 344 (1921) ("The construction placed upon the treaty before us and consistently adhered to by the Executive Department of the Government, charged with the supervision of our foreign relations, should be given much weight."). The government's

position also comports entirely with the court's own analysis of the treaty and its history.

Plaintiffs raise several additional arguments that bear only brief mention. First is the characterization of these claims as not arising out of the "prosecution of the war," as that phrase is used in the treaty. Plaintiffs attempt to cast their claims as involving controversies between private parties.

It is particularly far-fetched to attempt to distinguish between the conduct of Imperial Japan during the Second World War and the major industry that was the engine of its war machine. The lack of any sustainable distinction is apparent from the complaints in these cases. For example, the *King* complaint alleges that a class of war prisoners were forced to work "in support of the Japanese war effort," Compl. ¶56, and pursuant to a directive from the Japanese government that the " 'labor and technical skill' " of prisoners of war " 'be fully utilized for the replenishment of production, and contribution rendered toward the prosecution of the Greater East Asiatic War,' " *id.* at ¶30. Furthermore, the complaint asserts that plaintiff worked in a factory "where motor armatures were manufactured for the war effort." *Id.* at ¶35. These allegations quite clearly bring this action within the scope of the treaty's waiver of all claims "arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war." Treaty at Art 14(b).

Plaintiffs also argue that waiver of plaintiffs' claims renders the treaty unconstitutional and invalid under international law. This position is contrary to the well-settled principle that the government may lawfully exercise its "sovereign authority to settle the claims of its

nationals against foreign countries." *Dames & Moore v. Regan*, 453 U.S. 654, 679-80, 69 L. Ed. 2d 918, 101 S. Ct. 2972 (1981); *see also Neri*, 204 F.2d at 868-69 (enforcing treaty waiver of reparations claims).

Finally, plaintiffs assert that subsequent settlements between Japan and other treaty signatories on more favorable terms than those set forth in the treaty should "revive" plaintiff's claims under Article 26, which provides in relevant part:

> Should Japan make a * * * war claims settlement with any State granting that State greater advantages than those provided by the present Treaty, those same advantages shall be extended to the parties to the present Treaty.

Treaty at Art 26. Without deciding whether the evidence plaintiff cites of other agreements implicates Article 26, the court finds that that provision confers rights ***only*** upon the "parties to the present treaty," *i.e.*, the government signatories. The question of enforcing Article 26 is thus for the United States, not the plaintiffs, to decide.

IV.

The Treaty of Peace with Japan, insofar as it barred future claims such as those asserted by plaintiffs in these actions, exchanged full compensation of plaintiffs for a future peace. History has vindicated the wisdom of that bargain. And while full compensation for plaintiffs' hardships, in the purely economic sense, has been denied these former prisoners and countless other survivors of the war, the immeasurable bounty of life for themselves and their posterity in a free society and in a more peaceful world services the debt.

The motions to dismiss and/or for judgment on the pleadings are GRANTED. The clerk shall enter judgment in favor of defendants in the above-captioned cases.

IT IS SO ORDERED.

VAUGHN R WALKER

United States District Judge

TAIHEIYO CEMENT CORPORATION et al., Petitioners, v. SUPERIOR COURT, Respondent; JAE WON JEONG, Real Party in Interest.

S113759

SUPREME COURT OF CALIFORNIA

66 P.3d 1231; 2003 Cal. LEXIS 2794; 2003 Cal. Daily Op. Service 3746

(As corrected nunc pro tunc May 1, 2003)

April 30, 2003

NOTICE:

En Banc
Requests for judicial notice granted.
Applications for stay and petition for review GRANTED.

George Chief Justice
Kennard Associate Justice
Baxter Associate Justice
Werdegar Associate Justice
Chin Associate Justice
Brown Associate Justice
Moreno Associate Justice

TAIHEIYO CEMENT CORPORATION et al., Petitioners, v. THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES, Respondent. JAE WON JEONG, Real Party in Interest.

B155736

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION EIGHT

105 Cal. App. 4th 398; 129 Cal. Rptr. 2d 451; 2003 Cal. App. LEXIS 57; 2003 Cal. Daily Op. Service 515; 2003 Daily Journal DAR 589

January 15, 2003

COUNSEL:

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O'Melveny & Myers and John F. Niblock; McCutchen, Doyle, Brown & Enersen and David M. Balabanian; Morrison & Foerster, Lloyd Aubry and Arne D. Wagner; Pillsbury Winthrop and Barbara Croutch; Bingham Dana and Matthew Digby; Bingham McCutchen and Matthew Digby; Sullivan & Cromwell and Robert A. Sacks for Mitsubishi Materials Corp., Mitsubishi Materials U.S.A. Corp., Mitsui & Co., Ltd., Mitsui & Co. (U.S.A.), Inc., Mitsubishi International Corp., Ishikawajima Harima Heavy Industries Co., Ltd., IHI, Inc., Mitsubishi Heavy Industries, Ltd., Mitsubishi Heavy Industries America,

Inc., Mitsui Mining Co., Ltd., Mitsui Mining U.S.A., Inc., Nippon Steel Corporation, Nippon Steel U.S.A., Inc., Nippon Steel Trading Co., Ltd., and Nippon Steel Trading America, Inc., as Amici Curiae on behalf of Petitioners.

John S. Gordon, United States Attorney; Robert D. McCallum, Jr., Assistant Attorney General; James G. Hergen and Lara A. Ballard, United States Department of State; Mark Stern, Douglas Hallward-Driemeier and Kathleen Kane, United States Department of Justice, for the United States of America as Amicus Curiae on behalf of Petitioners.

Fleishman & Fisher, Barry A. Fisher, David Grosz; Lieff, Cabraser, Heimann & Bernstein, Elizabeth J. Cabraser, Morris A. Ratner, Bill Lann Lee, Scott P. Nealy; Blumenthal & Markham and David R. Markham; Law Offices of Haewon Shin and Haewon Shin; Cohen, Milstein, Hausfeld & Toll, Michael D. Hausfeld, Agnieszka M. Fryszman; Kenneth T. Haan & Associates and Kenneth T. Haan; Lim, Ruger & Kim, Christopher Kim and Lisa J. Yang for Real Party in Interest Jae Won Jeong.

Strumwasser & Woocher and Fredric D. Woocher; Jack Goldsmith and Erwin Chemerinsky for the Chinese American Citizens Alliance, the Korean-American Federation of Los Angeles, the Korean American Coalition, and the Korean American Chamber of Commerce of Los Angeles as Amici Curiae on behalf of Real Party in Interest.

Schonbrun, DeSimone, Seplow, Harris & Hoffman and Paul L. Hoffman for the Honorable John L. Burton, Herbert J. Wesson, Jr., Tom Hayden, Adam B. Schiff, Gil Cedillo, Wilma Chan, Dr. Judy Chu, Mike Honda, Carol Liu, and George Nakano, as Amici Curiae on behalf of Real Party in Interest.

Bill Lockyer, Attorney General for the State of California, Richard M. Frank, Chief Assistant Attorney General, Louis Verdugo, Jr., Senior Assistant Attorney General, Catherine Z. Ysrael, Supervising Deputy Attorney General, and Phyllis Cheng, Deputy Attorney General, for Attorney General Bill Lockyer as Amicus Curiae on behalf of Real Party in Interest.

OPINION:

BOLAND, J. – –

INTRODUCTION

Code of Civil Procedure section 354.6[1] allows certain individuals who were "slave labor" or "forced labor" victims during World War II (WWII) to recover compensation for unpaid labor and personal injuries suffered during that time period. In this case, we decide whether an international treaty preempts section 354.6 and whether the statute is unconstitutional because it impermissibly infringes upon the federal government's exclusive power over foreign affairs. We also decide whether section 354.6 is unconstitutional because it violates due process by allowing claims that arose long ago outside California. We hold the statute is neither preempted nor unconstitutional. Rather, it validly extends the applicable statute of limitations that would otherwise bar claims for unpaid labor and personal injuries suffered by slave or forced labor victims.

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[1] All further statutory references are to the Code of Civil Procedure, unless otherwise indicated.

FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

Jae Won Jeong sued to recover compensation for unpaid labor and personal injuries suffered while enslaved in a labor camp during WWII. Jeong, who is now a United States citizen and California resident, claims he was a Korean national during WWII. Refusing to join the Japanese military, Jeong was taken to a slave labor camp in Korea operated by a Japanese cement company. Along with other Korean nationals, Jeong was subjected to physical and mental torture and forced to perform hard physical labor without compensation, all to benefit the Japanese war effort.[2]

Onoda Cement Co., Ltd. is the Japanese entity that operated the company where Jeong was forced to work. Jeong sued Onoda, Taiheiyo Cement Corporation (the Japanese entity that succeeded Onoda by merger), and three of Taiheiyo's subsidiaries, all of which are referred to as "Taiheiyo."[3] Jeong alleged causes of action for (1) compensation under section 354.6, (2) unjust enrichment, (3) injuries in tort, including battery, intentional infliction of emotional distress, and unlawful imprisonment, and (4) unfair business practices under Business and Professions Code section 17200 et seq.

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[2] Jeong alleges he represents a class of plaintiffs in the United States who were forced to perform labor for the defendants between 1929 and 1945. A class has yet to be certified.

[3] The Taiheiyo subsidiaries are (1) Taiheiyo Cement U.S.A., (2) California Portland Cement Company, and (3) Lone Star Northwest, Inc. Each subsidiary is alleged as a California corporation. Lone Star is now known as Glacier Northwest, Inc., a Washington corporation.

Taiheiyo moved for judgment on the pleadings contending, among other grounds, that Jeong's claims were barred by the 1951 Treaty of Peace with Japan (1951 Treaty) and the 1965 Agreement between Japan and Korea. The trial court denied the motion, concluding (1) the 1951 Treaty did not apply to Korean nationals like Jeong because Korea was not a signatory to the treaty, (2) the 1965 Agreement between Japan and Korea did not preempt state law or bar Jeong's claims, and (3) no other federal law expressly or impliedly preempted section 354.6.

After the trial court denied Taiheiyo's motion, a federal district court decided a similar case brought under section 354.6 and concluded the statute was unconstitutional under the foreign affairs doctrine announced by the United States Supreme Court in *Zschernig v. Miller (1968) 389 U.S. 429, 19 L. Ed. 2d 683, 88 S. Ct. 664* (*Zschernig*). The district court ruled section 354.6 interfered with the federal government's exclusive power over foreign affairs and was unconstitutional. (See *In re: World War II Era Japanese Forced Labor (N.D. Cal. 2001) 164 F. Supp. 2d 1160, 1173* (*Forced Labor Litigation*).) As a result of the district court's decision, Taiheiyo filed a second motion for judgment on the pleadings asserting the same constitutional argument. In addition, Taiheiyo argued section 354.6 violated due process by reaching claims that arose in a foreign country over 50 years ago.

The trial court again denied Taiheiyo's motion. It disagreed with the federal court's application of *Zschernig* and concluded section 354.6 had no direct impact on foreign relations. The trial court also ruled section 354.6 did not violate due process, but rather legitimately extended statute of limitations that would otherwise bar

claims by slave or forced labor victims. This petition followed.

BASIS FOR WRIT REVIEW

In most cases, a review of rulings on pleadings is restricted to an appeal from a final judgment unless circumstances are "of such grave nature or of such significant legal impact that [the court is] compelled to intervene through the issuance of an extraordinary writ." (*Babb v. Superior Court* (1971) 3 Cal.3d 841, 851, 92 Cal. Rptr. 179, 479 P.2d 379.)

We agreed to review this case at the pleading stage because the constitutionality of section 354.6 represents a legal issue of widespread interest and significant legal importance. (See *Brandt v. Superior Court* (1985) 37 Cal.3d 813, 816, 210 Cal. Rptr. 211, 693 P.2d 796; *Omaha Indemnity Co. v. Superior Court* (1989) 209 Cal. App. 3d 1266, 1269-1270, 258 Cal. Rptr. 66.) In addition, because numerous cases asserting claims under section 354.6 are currently pending in the superior court and no California appellate court has yet ruled on the validity of this statute, we concluded writ review was warranted and authorized numerous amici curiae to present briefs in support of and in opposition to the petition.

Because this case involves pure questions of law, we are not bound by the trial court's decision. We therefore review it de novo, mindful that Jeong's factual allegations are assumed true. (*People v. Kennedy* (2001) 91 Cal.App.4th 288, 292, 110 Cal. Rptr. 2d 203; *Baughman v. State of California* (1995) 38 Cal.App.4th 182, 187, 45 Cal. Rptr. 2d 82.)

DISCUSSION

A. *Section 354.6 and Taiheiyo's Contentions*

The California Legislature enacted section 354.6 in 1999 as an emergency measure to extend the statute of limitations for a defined class of claims relating to forced or slave labor performed prior to and during WWII. (S.B. 1245.) The statute allows any WWII "slave labor victim" or "forced labor victim," or their heirs, to "bring an action to recover compensation for labor performed as a . . . slave labor victim or . . . forced labor victim from any entity or successor in interest thereof, for whom that labor was performed. . . . " (§ 354.6, subd. (b).) The statute provides that California courts have jurisdiction over such actions. (*Ibid.*)[4] Section 354.6 was enacted because "California has

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[4] A WWII "slave labor victim" is defined as "any person taken from a concentration camp or ghetto or diverted from transportation to a concentration camp or from a ghetto to perform labor without pay for any period of time between 1929 and 1945, by the Nazi regime, its allies and sympathizers, or enterprises transacting business in any of the areas occupied by or under control of the Nazi regime or its allies and sympathizers." (§ 354.6, subd. (a)(1).)

A WWII "forced labor victim" is defined as "any person who was a member of the civilian population conquered by the Nazi regime, its allies or sympathizers, or prisoner-of-war of the Nazi regime, its allies or sympathizers, forced to perform labor without pay for any period of time between 1929 and 1945, by the Nazi regime, its allies and sympathizers, or enterprises transacting business in any of the areas occupied by or under control of the Nazi regime or its allies and sympathizers." (§ 354.6, subd. (a)(2).)

"Compensation" means "the present value of wages and benefits that individuals should have been paid and damages for injuries sustained in connection with the labor performed. . . . " (§ 354.6, subd. (a)(3).)

Other portions of the statute allow slave or forced labor victims to sue the entity or successor in interest for whom labor was performed

(Continued on following page)

a moral and public policy interest in assuring that its residents and citizens are given a reasonable opportunity to claim their entitlement to compensation for forced or slave labor performed prior to and during the Second World War." (S.B. 1245, §1(c).)

Section 354.6, subdivision (c), provides that "any action brought under this section shall not be dismissed for failure to comply with the applicable statute of limitations, if the action is commenced on or before December 31, 2010." In declaring its specific intent, the Legislature added, "To the extent that the statute of limitations applicable to claims for compensation is extended by this act, that extension of the limitations period is intended to be applied retroactively, irrespective of whether the claims were otherwise barred by any applicable statute of limitations under any other provision of law prior to the enactment of this act." (S.B. 1245, § 1(d).)

Taiheiyo and amici curiae in support of the petition make four basic contentions concerning the invalidity of section 354.6. First, the 1951 Treaty either expressly or impliedly preempts section 354.6 because it demonstrates the policy of the federal government concerning WWII claims of Korean nationals like Jeong. Second, section 354.6 is unconstitutional under *Zschernig* because it

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"either directly or through a subsidiary or affiliate" and authorize interest on "the value of services at the time they were performed, compounded annually to date of full payment without diminution for wartime or postwar currency devaluation." (§ 354.6, subds. (a)(3) & (b).) The parties make only passing reference to these provisions in their written submissions to this court. Consequently, we do not address them.

usurps the federal government's exclusive power over foreign affairs. Third, section 354.6 violates due process by allowing claims that arose a half-century ago outside California. And fourth, Jeong's claims present nonjusticiable political questions. As we will explain, we reject these arguments.

B. *Preemption and the 1951 Treaty*

1. *Express Preemption*

Express preemption, as the term suggests, requires an affirmative declaration by Congress that federal law prohibits state regulation. (*Metropolitan Life Ins. Co. v. Massachusetts* (1985) 471 U.S. 724, 738, 85 L. Ed. 2d 728, 105 S. Ct. 2380; *Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 516-518, 120 L. Ed. 2d 407, 112 S. Ct. 2608; see also *Tafflin v. Levitt* (1990) 493 U.S. 455, 466, 107 L. Ed. 2d 887, 110 S. Ct. 792 [it is presumed Congress ordinarily does not intend to displace existing state authority].)

The U.S. Constitution mandates that treaties made "under the Authority of the United States, shall be the supreme Law of the Land," thus overriding any conflicting state law. (U.S. Const., art. VI; see *Missouri v. Holland* (1920) 252 U.S. 416, 432, 64 L. Ed. 641, 40 S. Ct. 382, 11 A.L.R. 984, 18 Ohio L. Rep. 61; *United States v. Belmont* (1937) 301 U.S. 324, 81 L. Ed. 1134, 57 S. Ct. 758; *Zicherman v. Korean Air Lines Co.* (1996) 516 U.S. 217, 226, 133 L. Ed. 2d 596, 116 S. Ct. 629.) In determining whether a treaty overrides state law, "it is our responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties." (*Air*

France v. Saks (1985) 470 U.S. 392, 399, 84 L. Ed. 2d 289, 105 S. Ct. 1338.)

The 1951 Treaty "was signed at San Francisco . . . by the representatives of the United States and 47 other Allied powers and Japan. [Citation]. President Truman, with the advice and consent of the Senate, ratified the treaty and it became effective April 28, 1952. [Citation.] . . . [P] [HN10] The salient features of the agreement are: (1) a grant of authority of Allied powers to seize Japanese property within their jurisdiction at the time of the treaty's effective date; (2) an obligation of Japan to assist in the rebuilding of territory occupied by Japanese forces during the war[,] and (3) waiver of all 'other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war. . . . ' [Citation.]" (*In re World War II Era Japanese Forced Labor* (N.D.Cal. 2000) 114 F. Supp. 2d 939, 944-945.) Neither Korea nor China were signatories to the 1951 Treaty. (*Forced Labor Litigation*, *supra*, 164 F. Supp. 2d at pp. 1167-1168.)

Taiheiyo and the United States as amicus curiae argue the waiver provision of Article 14(b) of the 1951 Treaty expressly preempts Korean nationals like Jeong from asserting claims under section 354.6. The provision reads: "(b) Except as otherwise provided in the present Treaty, the Allied Powers waive all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war, and claims of the Allied Powers for direct military costs of occupation." (Treaty of Peace With Japan, Sept. 8, 1951, 3 U.S.T. 3169, 3183, T.I.A.S. No. 2490.)

Nothing in this or any other provision of the 1951 Treaty expressly preempts or bars claims by Korean nationals against Japanese corporations for unpaid labor or personal injuries suffered for slave or forced labor during WWII. To the contrary, the treaty recognized the waiver provision of Article 14 was to have no effect on the claims of non-signatory nations.

The 1951 Treaty did not address claims between Korean and Japanese nationals because the Allied Powers had no authority to bind Korea, which was not a signatory nation to the Treaty. The 1951 Treaty, however, provides that claims between Korean and Japanese nationals were to be the subject of separate arrangements between the two countries. Specifically, Article 4(a), which addressed Japan's post-war relationship with Korea, provides that "the disposition of property of Japan and of its nationals . . . and their claims, including debts, against [Korea] . . . , and the disposition in Japan of property of [Korean] authorities and residents, and of claims, including debts, of [Korean] authorities and residents against Japan and its nationals, shall be the subject of special arrangements between Japan and such authorities." (1951 Treaty, *supra*, 3 U.S.T. at p. 3173.)

Korea benefited from Article 4(a)'s requirement that Japan enter into future negotiations concerning the resolution of war claims.[5] However, neither Japan nor

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[5] In June 1965, Japan and the Republic of Korea entered into an agreement concerning war claims. (See Agreement on the Settlement of Problems Concerning Property and Claims and on the Economic Co-operation Between Japan and the Republic of Korea, June 22, 2965, 8473 U.N.T.S. 258.) Taiheiyo does not contend in its petition that the

(Continued on following page)

Korea was required to implement any specific resolution. Indeed, Korea was under no obligation to even negotiate with Japan concerning the settlement of war claims. Further, another treaty provision required Japan, as part of any future arrangements with non-signatory nations, to provide them "the same or substantially the same terms" as to the signatory nations. However, even that obligation, binding only on Japan, expired after three years.[6]

In sum, the 1951 Treaty did not bar future claims by individuals of non-signatory nations and does not expressly preempt section 354.6. We therefore agree with the conclusions of *Forced Labor Litigation* that Article 4(a) "suggests that the treaty contemplates resolution of war claims with Korea . . . through agreements separate and distinct from the [1951 Treaty] and separate agreements necessarily create the possibility that the terms for resolving those claims may differ from the terms of the treaty entered into by the Allied nations. The fact that the signatory nations encouraged such agreements does not show an intent to occupy the field of non-signatory nations' claims through the treaty. . . . Whether the agreements subsequently entered by Japan with Korea . . . eliminated

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1965 Treaty expressly preempts Jeong's claims under section 354.6. Rather, Taiheiyo and the United States contend the treaty, as incorporated by reference into the 1951 Treaty, demonstrated the U.S. Congress' overall purpose and intent to preempt the field of war-related claims. We address this implied preemption argument below.

[6] Article 26 provides, in relevant part: "Japan will be prepared to conclude with any State . . . which is not a signatory to the present Treaty, a bilateral Treaty of Peace on the same or substantially the same terms as are provided for in the present Treaty, but this obligation on the part of Japan will expire three years after the first coming into force of the present Treaty." (1951 Treaty, *supra*, 3 U.S.T. at p. 3190.)

the claims of [this] non-signatory nation[ ] does not bear on whether the [1951 Treaty] preempts claims of . . . Korean nationals. The court reads the language of article[ ] 4(a) . . . to suggest only that the signatory nations, including the federal government of the United States, did not intend the [1951 Treaty] to control claims of individuals from non-signatory nations." (*Forced Labor* Litigation, *supra*, 164 F. Supp. 2d at pp. 1167-1168.).[7]

2. *Implied Preemption*

Taiheiyo and the United States further argue that even if the 1951 Treaty does not expressly preempt section 354.6, it is implicitly preempted because the treaty establishes federal policy with respect to the war-related claims of Korean nationals. This contention likewise is without merit.

Federal law "implicitly overrides state law either when the scope of a statute indicates that Congress intended federal law to occupy a field exclusively [citation]

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[7] Not only do Articles 4(a) and 14(b) demonstrate an intent that the treaty did not bind non-signatory nations such as Korea and China, but the waiver provisions are not as broad as Taiheiyo and amici curiae contend. Article 14(b) waives claims arising out of actions "taken in the course of the prosecution of the war." As one commentator suggests, it is reasonable to interpret this clause to exclude actions taken by private Japanese companies for profit as not being actions taken in the "course of the prosecution of the war." (See Bazyler, *The Holocaust Restitution Movement in Comparative Perspective (2002)* 20 Berkeley J. Int'l Law, 21-22 [citing *Kawakita v. United States* (1952) 343 U.S. 717, 727-728, 96 L. Ed. 1249, 72 S. Ct. 950, where the Supreme Court concluded Japanese companies doing business during the war should be viewed as nothing more than private, profit-making ventures].)

or when state law is in actual conflict with federal law." (*Freightliner Corp. v. Myrick* (1995) 514 U.S. 280, 287, 131 L. Ed. 2d 385, 115 S. Ct. 1483.) The Supreme Court has found implied pre-emption "where it is 'impossible for a private party to comply with both state and federal requirements' [citation], or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" (*Ibid.*) "Pre-emption of a whole field . . . will be inferred where the field is one in which 'the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" (*Hillsborough County v. Automated Medical Labs.* (1985) 471 U.S. 707, 713, 85 L. Ed. 2d 714, 105 S. Ct. 2371; see also *Boyle v. United Technologies Corp.* (1988) 487 U.S. 500, 507, 101 L. Ed. 2d 442, 108 S. Ct. 2510.)

Nothing in Article 14(b) or any other provision of the 1951 Treaty signals the United States' intent to occupy the entire field of claims of non-signatory nationals against Japanese corporations for unpaid labor or personal injuries suffered for slave or forced labor during WWII. The United States' waiver of claims by its nationals in Article 14(b) applies only to persons who were nationals of the United States at the time. (See *Dames & Moore v. Regan* (1981) 453 U.S. 654, 679-680, 69 L. Ed. 2d 918, 101 S. Ct. 2972; *Haven v. Polska* (7th Cir. 2000) 215 F.3d 727, 734.) The United States had no power to waive the claims of nationals from foreign countries and made no provision, either in the 1951 Treaty or in subsequent federal law, to prevent claims from future United States citizens who were nationals of non-signatory nations at the time of the 1951 Treaty.

The fact that the 1951 Treaty called upon Japan to enter into future negotiations with Korea does not evidence an intent to foreclose claims by individuals of nonsignatory nations against Japanese nationals, either in United States courts or elsewhere. Other than encouraging Japan to enter into negotiations with Korea, the Allied Powers, including the United States, had no power or control over the outcome of such negotiations. The Allied Powers must have understood the possibility that the negotiations could fail to produce an agreement between the two countries concerning war claims, and that Korean nationals would be compelled to assert their own individual claims against Japanese nationals.

As a United States citizen, Jeong has a constitutional right of access to the courts of this state in an attempt to redress his individual grievances. (See *Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 647-648, 49 Cal. Rptr. 2d 620; *California Teachers Assn. v. State of California* (1999) 20 Cal.4th 327, 338-339, 975 P.2d 622, 84 Cal. Rptr. 2d 425.) That fundamental right of citizenship may not be foreclosed upon a claim of implied preemption unless the language of the 1951 Treaty indicates a clear intent to exclusively occupy the field of Korean claims arising out of WWII. Such clarity is lacking in this case. The 1951 Treaty did not address claims by Korean nationals against Japanese entities conducting business in the United States for unpaid labor and personal injuries suffered during WWII. Nothing in the 1951 Treaty evidences an intent to occupy the field of claims by Korean nationals against Japanese nationals. In short, the fact that section 354.6 allows pre-existing claims to proceed in California courts by retroactively extending the applicable statute of limitations does not implicate the 1951 Treaty.

As the court in *Forced Labor Litigation* commented, "Although from a perspective of 2001 it may seem anomalous for the United States to negotiate a treaty that bars the claims of its own nationals without a provision that forecloses resort to a judicial forum in the United States by nationals of non-signatory nations, Article 14(b) contains no express limitation against claims of non-signatory nationals. Little should be read into this omission, which most likely can be explained by the inconceivability a half century ago of such claims by non-signatory nationals being pursued in United States courts." (*Forced Labor Litigation, supra*, 164 F. Supp. 2d at p. 1167.) We hold the 1951 Treaty does not implicitly preempt section 354.6.

C. *Section 354.6 and the Zschernig Doctrine*

Taiheiyo and amicus curiae next argue that, even without consideration of the 1951 Treaty, section 354.6 is unconstitutional in its application because it impermissibly intrudes on the exclusive foreign affairs power of the United States as expressed in *Zschernig*. We disagree.

1. *The Zschernig Doctrine*

Zschernig articulated the "dormant foreign relations preemption" doctrine, which holds the federal government has exclusive power in the field of foreign relations even in the absence of any federal law or treaty. (*Gerling Global Reinsurance Corp. of America v. Low* (9th Cir. 2001) 240 F.3d 739, 751, fn. 9 (*Gerling Global*); *National Foreign Trade Council v. Natsios* (1st Cir. 1999) 181 F.3d 38, 58-59,

fn. 14.) In *Zschernig*, the Supreme Court held, "an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress" is unlawful if the state law "has a direct impact upon foreign relations and may well adversely affect the power of the central government to deal with those problems." (Zschernig, *supra*, 389 U.S. at pp. 432, 441.) States may enact laws affecting local concerns that touch upon foreign affairs, but only if their actions have "some incidental or indirect effect in foreign nations." (*Id.* 389 U.S. at p. 433.)

At issue in *Zschernig* was an Oregon statute providing that a nonresident alien's probate claim to property of Oregon decedents would escheat to the state unless the alien could show the laws of his or her country allowed inheritance of Oregon estates "without confiscation." (*Zschernig*, *supra*, 389 U.S. at p. 430.) Writing for the Court, Justice Douglas concluded, "It seems inescapable that the type of probate law that Oregon enforces affects international relations in a persistent and subtle way. The practice of state courts in withholding remittances to legatees residing in Communist countries or in preventing them from assigning them is notorious. [Footnote omitted.] The several States, of course, have traditionally regulated the descent and distribution of estates. But those regulations must give way if they impair the effective exercise of the Nation's foreign policy. [Citation.] Where those laws conflict with a treaty, they must bow to the superior federal policy. [Citation.] Yet, even in absence of a treaty, a State's policy may disturb foreign relations." (*Id.* 389 U.S. at pp. 440-441.)

Zschernig distinguished *Clark v. Allen* (1947) 331 U.S. 503, 91 L. Ed. 1633, 67 S. Ct. 1431 (*Clark*), which twenty years earlier upheld a similar California probate law. In

Clark, a California statute provided non-resident aliens could not inherit under a will unless United States citizens were entitled to take under the laws of the foreign country on the same terms as its citizens. Again writing for the Court, Justice Douglas responded to the claim that the California statute "is an extension of state power into the field of foreign affairs, which is exclusively reserved by the Constitution to the Federal Government." (*Id.* at p. 516.) Noting local law determined rights of succession of property and the California statute was neither preempted by "different or conflicting arrangements" at the federal level or treaties with another country, Justice Douglas concluded the statute did not impermissibly intrude into the field of foreign affairs. (*Id.* at p. 517.) He observed, "What California has done will have some incidental or indirect effect in foreign countries. But that is true of many state laws which none would claim cross the forbidden line." (*Ibid.*)

The distinction between *Clark* and *Zschernig* hinged on the procedural posture of the case before the *Zschernig* court. The record in *Zschernig* contained evidence that, in the administration of statutes similar to the one in Oregon, the probate courts of various states had launched broad and inappropriate inquiries into the structure of foreign nations. The inquiries included (1) whether aliens under their laws had enforceable rights, (2) whether the "rights" were merely dispensations turning upon the whim or caprice of government officials, (3) whether the representations of consuls, ambassadors and other representatives of foreign nations were credible and made in good faith, and (4) whether any element of confiscation was present in the actual administration of the particular foreign system of law. (*Zschernig*, *supra*, 389 U.S. at pp.

433-434.) Because the inquires resulted in unavoidable criticism of other nations and posed a potential risk of disruption and embarrassment in the international arena, the Supreme Court concluded the Oregon statute had more than an incidental or indirect effect in foreign nations. "That kind of state involvement in foreign affairs and international relations . . . [,]" said Justice Douglas, "is not sanctioned by *Clark v. Allen.*" (*Id.* 389 U.S. at p. 436.)

Under *Clark* and *Zschernig*, a statute will be invalidated if its application involves a state making inappropriate inquiries and criticisms regarding the operations of foreign governments so that the statute has "more than 'some incidental or indirect effect in foreign countries.'" (*Zschernig, supra*, 389 U.S. at p. 434; see also *Gerling Global, supra*, 240 F.3d at p. 752-753; *Trojan Technologies, Inc. v. Com. of PA* (3rd Cir. 1990) 916 F.2d 903, 913 (*Trojan Technologies*); *Marootian v. New York Life Ins. Co.* (C.D.Cal. Nov. 28, 2001, No. 99-12073) 2001 U.S.Dist. LEXIS 22274 (*Marootian*); see also *Board of Trustees v. City of Baltimore* (Md. 1989) 317 Md. 72, 562 A.2d 720, 746 [where the Maryland appellate court noted, "In explaining the distinction between *Clark v. Allen* and *Zschernig v. Miller*, courts and commentators have focused on the extensive judicial scrutiny and criticism of foreign governments to which the Court referred in the *Zschernig* opinion"].)[8]

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[8] *Zschernig* remains the only case where the Supreme Court invalidated a state statute because it violated the foreign affairs power. (See *Barclays Bank PLC v. Franchise Tax Bd. of Cal.* (1994) 512 U.S. 298, 328, 129 L. Ed. 2d 244, 114 S. Ct. 2268 [where the Supreme Court

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2. *Cases Applying Zschernig*

In *Trojan Technologies*, the Third Circuit rejected a foreign affairs challenge by a Canadian corporation concerning a Pennsylvania "Buy American" law. The statute required suppliers who contracted with a public agency on a public works project to provide American-made products. (*Trojan Technologies*, *supra*, 916 F.2d at p. 904.) The court held the statute exhibited none of the risks identified in *Zschernig*. The statute did not provide an opportunity for state administrative officials or judges to comment on the nature of foreign regimes. The statute applied to products from any foreign source, without singling out any particular country. The record did not indicate the statute was selectively applied according to foreign policy attitudes of Pennsylvania officials. Finally, Congress was aware of various "Buy American" statutes, but took no action to preempt them through federal legislation. (*Id.* 916 F.2d at pp. 913-914.)

In *Gerling Global*, the Ninth Circuit held California's Holocaust Victim's Insurance Relief Act (HVIRA) did not violate the foreign affairs doctrine under *Zschernig*. (*Gerling Global*, *supra*, 240 F.3d at pp. 741-742.) The HVIRA required California insurers who sold policies in Europe between 1920 and 1945 to file information about the policies with the state insurance commissioner. (See *Ins. Code, § 13804*, subd. (a).) The court held *Zschernig* did not apply to the HVIRA because the plaintiffs were businesses not foreign governments, the HVIRA did not

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made clear that in the absence of controlling federal law, courts have no authority to identify the foreign relations affects of a state law and weight them against the competing legitimate interests of states].)

refer to any particular country, and no evidence revealed the HVIRA would be applied in a manner that implicated the diplomatic concerns articulated in *Zschernig*. (*Gerling Global*, *supra*, 240 F.3d at p. 753.)

Over 30 years ago, in *Estate of Horman* (1971) 5 Cal.3d 62, 95 Cal. Rptr. 433, 485 P.2d 785, the California Supreme Court applied the same foreign affairs analysis used in *Trojan Technologies* and *Gerling Global* in rejecting a challenge under *Zschernig*. In that case, a number of citizens of the Soviet Union were heirs to a California estate. The heirs challenged the constitutionality of Probate Code section 1026, which placed a five-year time limit upon non-resident aliens to claim interests in estates. The Court held, "Probate Code, section 1026 does not involve the state in any inquiry into foreign law, administration of foreign law, credibility of foreign governmental officials or any other matter condemned by *Zschernig*. All that is required by Probate Code, section 1026 is the computation of five years from the date of death of the decedent. The same time period applies to all nonresident aliens alike, regardless of their country of residence, its law or its policies." (*Id.* at p. 80.)

The court concluded the statute could not "be characterized as having a 'direct impact upon foreign relations,' nor is it likely to 'adversely affect the power of the central government to deal with' foreign relations. At most, its effect upon foreign relations is 'incidental or indirect,' and it does not unconstitutionally impinge upon the exclusive and plenary power of the federal government to deal with foreign affairs." (*Estate of Horman*, *supra*, 5 Cal.3d at pp. 80-81, citing *Zschernig*, *supra*, 389 U.S. 429; see also *Amarel v. Connell* (1988) 202 Cal. App. 3d 137, 145-146,

248 Cal. Rptr. 276 [claims asserted under California anti-competition statutes do not impermissibly intrude into foreign affairs]; but see *Bethlehem Steel Corp. v. Board of Commissioners* (1969) 276 Cal. App. 2d 221, 228, 80 Cal. Rptr. 800 [concluding California's "Buy American" statute had more than an incidental effect on foreign relations because it did impact current trade relations with foreign countries].)

Most recently, a federal district court addressed a *Zchernig* foreign affairs challenge to California's Armenian Genocide Victims Insurance Act. (See *Marootian, supra,* 2001 U.S.Dist. LEXIS 22274.) The statute provides that an Armenian Genocide victim, or victim's heirs and beneficiaries, may file a legal claim in California courts to recover benefits under any insurance policy issued or in effect between 1875 and 1923. (§ 354.4.)[9] Similar to

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[9] Section 354.4 defines "Armenian Genocide victim" as "any person of Armenian or other ancestry living in the Ottoman Empire during the period of 1915 to 1923, inclusive, who died, was deported, or escaped to avoid persecution during that period." (§ 354.4, subd. (a)(1).) The statute further provides, in relevant part: "(b) Notwithstanding any other provision of law, any Armenian Genocide victim, or heir or beneficiary of an Armenian Genocide victim, who resides in this state and has a claim arising out of an insurance policy or policies purchased or in effect in Europe or Asia between 1875 and 1923 from an insurer described in paragraph (2) of subdivision (a), may bring a legal action or may continue a pending legal action to recover on that claim in any court of competent jurisdiction in this state, which court shall be deemed the proper forum for that action until its completion or resolution. [¶] (c) Any action, including any pending action brought by an Armenian Genocide victim or the heir or beneficiary of an Armenian Genocide victim, whether a resident or nonresident of this state, seeking benefits under the insurance policies issued or in effect between 1875 and 1923 shall not be dismissed for failure to comply with the

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section 354.6, section 354.4 allows for venue in California courts, extends the statute of limitations on claims to 2010, and provides for retroactive application. (See § 354.4, subd. (c) and S.B. 1915, § 1(d).) The defendant insurer argued the statute was unconstitutional because "'it adopts an official position on an extremely sensitive foreign affairs issue.'" (*Marootian*, *supra*, 2001 U.S.Dist. LEXIS 22274 at p. 32.)

Concluding the Ninth Circuit's decision in *Gerling Global* was applicable to section 354.4, the court stated, "Section 354.4, which simply provides venue in the California courts for the disputed . . . insurance claims, does not require the type of wide-ranging government inquiry into a foreign government's practices which the Supreme Court found objectionable in *Zschernig*. As in *Gerling Global*, none of the parties here is a foreign government, nor owned by a foreign government; [footnote omitted] they are simply an insurance carrier and the beneficiaries under its policies of insurance. Also, like the plaintiffs in *Gerling Global*, [the defendant] is an insurance company that does business in California and is, or is related to, companies that issued the insurance policies at issue herein." (*Marootian*, *supra*, 2001 U.S.Dist. LEXIS 22274 at p. 36.)

3. *Application of Zschernig to this Case*

We conclude the above decisions are applicable to section 354.6. We disagree that section 354.6 creates a

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applicable statute of limitation, provided the action is filed on or before December 31, 2010."

cause of action where none previously existed and interferes with the federal government's ability to conduct foreign affairs. Instead, we view section 354.6 as essentially a procedural statute designed to allow venue in California courts. Section 354.6 retroactively extends the statute of limitations applicable to claims for unpaid labor and personal injuries against private entities. This conclusion is based upon the following analysis.

First, we discern no improper foreign policy purpose underlying the enactment of section 354.6. The Legislature's purpose in enacting section 354.6 was to assure that "[California] residents and citizens are given a reasonable opportunity to claim their entitlement to compensation for forced or slave labor performed prior to and during the Second World War." (S.B. 1245, § 1(c).) The declared purpose behind the section is to protect the rights of residents by retroactively extending the statute of limitations applicable to pre-existing claims and allowing venue in California courts. Not only do states have broad police powers to protect its [sic] residents in such a manner, but establishing a statute of limitations is a state prerogative. (See, e.g., *De Canas v. Bica* (1976) 424 U.S. 351, 356, 47 L. Ed. 2d 43, 96 S. Ct. 933 [states have broad authority under their police powers to protect their residents]; *Sun Oil Co. v. Wortman* (1988) 486 U.S. 717, 722, 100 L. Ed. 2d 743, 108 S. Ct. 2117 (*Sun Oil*) [the procedural rules of state courts, such as statute of limitations, are matters within a state's interest concerning which it may legislate]; see also *People v. Frazer* (1999) 21 Cal.4th 737, 758, 768, 982 P.2d 180, 88 Cal. Rptr. 2d 312 [statutes of limitations are an "optional form of legislative grace" and as "instruments of public policy" have never been viewed as

conferring any fundamental rights rooted in the Constitution].)[10]

We reject the contention that section 354.6 was enacted for an improper foreign policy purpose because it is directed toward a specific foreign country. The statute allows recovery of uncompensated labor performed for "the Nazi regime, its allies or sympathizers, or enterprises transacting business in any of the areas occupied by or under the control of the Nazi regime or its allies and sympathizers." (§ 354.6, subds. (a)(1) & (a)(2).) Section 354.6 is not aimed solely at Japanese and German companies. Any company that conducted business in "any of the areas occupied by or under the control of the Nazi regime or its allies and sympathizers" may be sued under the statute. That would include American, British, French and other companies. By its terms, section 354.6 does not target a specific foreign country nor implicate any foreign policy between the United States and Japan. (See *Gerling Global, supra*, 240 F.3d at p. 753 [*Zschernig* not applicable

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[10] Taiheiyo and the United States cite a Los Angeles Times article quoting the legislative author of section 354.6 as indicative of its legislative purpose. Unofficial comments by a single legislative sponsor shed no light on the true intent of the enactment. (See *California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 699-700, 170 Cal. Rptr. 817, 621 P.2d 856 [the use of a single senator's statements to determine legislative intent violates well-established principals of statutory construction, even where the senator actually authored the bill in controversy]; *Honey Springs Homeowners Assn. v. Board of Supervisors* (1984) 157 Cal. App. 3d 1122, 1134, 203 Cal. Rptr. 886 [judiciary is reluctant to rely on statements by individual members of the Legislature as an expression of the intent of the entire body].)

to HVIRA, which was aimed at insurers issuing policies to persons "in Europe"].)

Second, section 354.6 does not involve the type of wide-ranging government scrutiny or criticism of a foreign government's practices that the Supreme Court found objectionable in *Zschernig*. The statute does not require a state court to inquire into current policy of a foreign nation or the structure of its government. In addition, the statute does not make any statement concerning or criticize the current or past foreign policies of any country. It specifically applies to pre-existing monetary claims against private companies, not to foreign governments.

Third, section 354.6 does not have more than "an incidental or indirect effect" on the federal government's current or future relations with any foreign country, such as Japan or Korea, because the statute applies retroactively, not prospectively, to claims against private companies. By allowing the initiation of actions on expired claims for unpaid labor and personal injuries suffered by workers enslaved by private companies during *WWII,* section 354.6 does not provide a forum to criticize Japan's current policies or practices. The litigation of such claims, at least in Jeong's case, will require evidence of his imprisonment in Korea, the conditions he endured, the type of labor he performed, the length of time he performed it at Onoda's camp, and the injuries suffered during his imprisonment. However, other than the unique circumstance that the events occurred over 50 years ago, the evidence required at trial will be similar to proof required in any civil case seeking restitution or quasi-contractual recovery for unjust enrichment, false imprisonment, or assault and battery.

There is no basis to conclude that the litigation of slave and forced labor claims will necessarily involve California courts in any criticism of Japan's present governmental structure or foreign policy. The potential that affiliates or subsidiaries of Japanese companies conducting business in California can be held liable for unpaid labor or personal injuries suffered in the past may displease those entities. It may even displease the Japanese government. However, this possible result does not implicate the impermissible governmental inquiries or criticisms the Supreme Court found objectionable in *Zschernig*. (See *Patrickson v. Dole Food Company* (9th Cir. 2001) 251 F.3d 795, 803-804 [courts cannot tailor their decisions to accommodate the displeasure of non-party foreign governments].) As Justice Douglas commented, "What California has done will have some incidental or indirect effect in foreign countries. But that is true of many state laws which none would claim cross the forbidden line." (*Clark*, *supra*, 331 U.S. at p. 517.)

In sum, section 354.6 permits actions for unpaid labor and personal injuries arising out of events that occurred during WWII. The statute permits the pre-existing claims by retroactively extending the limitations period applicable to the claims. Contrary to the arguments asserted by Taiheiyo and the United States, the fact that the claims arose during WWII does not automatically implicate the foreign affairs doctrine. Neither Taiheiyo nor the United States has cited any foreign affairs disruption that has resulted, or is likely to result, from actions brought under section 354.6.

4. *Distinguishable Case Law*

Taiheiyo and amici curiae cite numerous cases which have invalidated state laws under *Zschernig*. They argue these cases are applicable because the state laws were similar to section 354.6. The cases, however, are distinguishable.

In *Miami Light Project v. Miami-Dade County* (S.D.Fla. 2000) 97 F. Supp. 2d 1174, ordinances were enacted requiring persons seeking to contract with Miami-Dade County to sign affidavits stating they did not transact business with Cuba or Cuban nationals. The ordinances were passed in response to an international incident that occurred in the Florida Straits where Cuban jet fighters shot down four pilots who were members of a humanitarian organization. In partially granting the plaintiffs' motion for a preliminary injunction, the court concluded the plaintiffs were likely to prevail on their claim that the ordinances were unconstitutional under *Zschernig* because "the stated purpose of the [law] is to protest and condemn Cuba's totalitarian regime . . . [¶] . . . [¶] [and] designed to specifically impact and affect the affairs of a foreign country." (*Id.* at p. 1180.)

In *National Foreign Trade Council v. Natsios, supra,* 181 F.3d 38, a Massachusetts law was enacted restricting the ability of state agencies to purchase goods from companies doing business in Burma. The court held the law had a significant, direct effect on a foreign government and therefore inappropriately interfered with the federal foreign affairs power under *Zschernig*. The court arrived at this conclusion because the design and intent of the law demonstrated displeasure for Burma's human rights

policies, thereby affecting that country's affairs. (*Id.* at p. 53.)

In *Tayyari v. New Mexico State University* (D.N.M. 1980) 495 F. Supp. 1365, New Mexico State University passed a motion "designed to rid the campus of Iranian students." (*Id.* at p. 1367.) The motion sought to retaliate against Iran, which held American hostages at the time, by refusing to enroll Iranian students until the release of the hostages. The court invalidated the motion as imposing an impermissible burden on the federal government's power to regulate immigration and conduct foreign affairs because the "motion [was] directed at one nation, Iran. [The] purpose was to make a political statement about the hostage situation in Iran and to retaliate against Iranian nationals here." (*Id.* at pp. 1379-1380.)

In each case, the state law was invalidated because it was designed to influence a current policy of a foreign government that was considered offensive and had the potential to adversely affect trade or diplomatic relations with a foreign country. By contrast, section 354.6 is restricted to the past conduct of private companies. The statute does not permit the assertion of claims against Japan or any other country. It does not attempt to affect foreign trade or influence the policies of any foreign government.

The sole purpose of section 354.6 is to extend the statute of limitations for common law claims for unpaid labor and personal injuries arising out of slave or forced labor. Not only is this a permissible state function, but there is no reason to believe the adjudication of the claims will interfere with the federal government's ability to conduct foreign affairs. Any effect the adjudication of

claims under section 354.6 may have on foreign nations is merely incidental and indirect.[11]

D. *Due Process*

Taiheiyo contends section 354.6 violates its right to due process. Citing *Phillips Petroleum Co. v. Shutts* (1985) 472 U.S. 797, 86 L. Ed. 2d 628, 105 S. Ct. 2965 (*Shutts*) and *Gerling Global Reinsurance Corp. v. Gallagher* (11th Cir. 2001) 267 F.3d 1228, Taiheiyo argues "California has no power to reach across the seas and into the long distant past to legislate civil penalties for parties who had no contemporaneous connection with California." This contention not only mischaracterizes section 354.6, but ignores well-established precedent that a state has the legislative jurisdiction to control the remedies available in its courts.

In *Shutts*, the Supreme Court held the U.S. Constitution limits a forum state's application of its substantive law to the claims of nonresident plaintiffs in a nationwide class action. In order to constitutionally apply its substantive law to the claims of nonresident class members, the forum state must have " 'significant contact or significant

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[11] Other cases cited by Taiheiyo and amici curiae are similarly distinguishable. (See *Springfield Rare Coin Galleries v. Johnson* (1986) 115 Ill. 2d 221, 236, 104 Ill. Dec. 743, 503 N.E.2d 300 [regulation exempting all gold and silver coins from taxation except the Krugerrand held invalid because it was designed to express disapproval of South Africa's apartheid policy]; *New York Times Co. v. City of New York Com'n* (1977) 41 N.Y.2d 345, 352, 393 N.Y.S.2d 312, 361 N.E.2d 963 [city prohibition on advertising job opportunities in South Africa held impermissible because its purpose was to impose an economic boycott aimed at South Africa's apartheid policy].)

aggregation of contacts' to the claims asserted by each member of the plaintiff class, contacts 'creating state interests,' in order to ensure that the choice of [the forum state's] law is not arbitrary or unfair. [Citation.]" (*Shutts, supra*, 472 U.S. at pp. 821-822.) Because in *Shutts* the forum state lacked interest in claims unrelated to that state asserted by nonresidents, the Court concluded the application of that state's law to every claim in the case was sufficiently arbitrary and unfair as to exceed constitutional limits. (*Ibid.*)

Shutts is inapplicable because section 354.6 is essentially a procedural statue designed to extend the applicable statute of limitations and allow venue in California courts. Thus, it must be evaluated under the standards the Supreme Court articulated in *Sun Oil, supra*, 486 U.S. 717. (See *Marootian, supra*, 2001 U.S.Dist. LEXIS 22274 at p. 36 [concluding section 354.4 (the Armenian Genocide Victims Insurance Act) is a procedural statute establishing venue in California, does not implicate due process, and should be evaluated under *Sun Oil*].)

In *Sun Oil*, Kansas courts applied a longer Kansas statute of limitations to claims by residents of other states concerning property located in those states and governed by the laws of those states. The Supreme Court characterized the Kansas statute of limitations as a procedural rule and concluded: "This Court has long and repeatedly held that the Constitution does not bar application of the forum State's statute of limitations to claims that in their substance are and must be governed by the law of a different State. . . . [¶] Since the procedural rules of its courts are surely matters on which a State is competent to legislate, it follows that a State may apply its own procedural rules

to actions litigated in its courts." (*Sun Oil, supra*, 486 U.S. at p. 722.)

In rejecting defendant's due process challenge, the Court added: "A State's interest in regulating the workload of its courts and determining when a claim is too stale to be adjudicated certainly suffices to give it legislative jurisdiction to control the remedies available in its courts by imposing statutes of limitations. Moreover, petitioner could in no way have been unfairly surprised by the application to it of a rule that is as old as the Republic. There is, in short, nothing in Kansas's action here that is 'arbitrary or unfair,' [citation] and the due process challenge is entirely without substance." (*Sun Oil, supra*, 486 U.S. at p. 730.)

Section 354.6, which is placed in the Code of Civil Procedure title dealing with statute of limitations, extends the limitations period applicable to claims of slave and forced labor victims for unpaid labor and personal injuries. It further specifies that their claims may be filed and adjudicated in California courts. The statute neither specifies the essential elements of the claims nor mandates the application of California substantive law. It is, in essence, a procedural statute. Contrary to Taiheiyo's assertions, section 354.6 does not create a new cause of action where none previously existed. The claims of victims like Jeong for unpaid labor and personal injuries existed prior to section 354.6's enactment and would have been viable common law claims under California law, both when they arose and today, had they not been time-barred. (See, e.g., *Philpott v. Superior Court* (1934) 1 Cal.2d 512, 517, 36 P.2d 635 and *McCall v. Superior Court* (1934) 1 Cal.2d 527, 531, 36 P.2d 642 [recognizing right to restitution or quasi-contractual recovery based upon unjust

enrichment]; *Pulvermacher v. Los Angeles Co-ordinating Com.* (1943) 61 Cal. App. 2d 704, 143 P.2d 974 and *Trube v. Katz* (1923) 60 Cal.App. 474, 213 P. 264 [allowing claims for false imprisonment and assault].)[12]

Consistent with *Sun Oil*, by enacting section 354.6, the Legislature has assessed the workload of California courts and decided that public policy mandated a consideration of slave and forced labor claims like Jeong's, despite the length of time that had elapsed since the occurrence of events underlying those claims. (See *Marootian, supra*, 2001 U.S.Dist. LEXIS 22274 at p. 36.)

Just as *Shutts* is inapplicable, so is *Gerling Global Reinsurance Corp. v. Gallagher, supra*, 267 F.3d 1228. In that case, the Florida insurance commissioner issued subpoenas to Florida insurers asking for information about their German affiliates' issuance of policies to Holocaust victims. The Eleventh Circuit addressed the narrow issue of whether Florida's Holocaust Victims Insurance Act (Act) could, consistent with due process, form the basis for issuance of the subpoenas. The Act required Florida insurers to file extensive information concerning Holocaust-era policies with the commissioner and authorized penalties for failing to do so. The court held the Act could not form the basis for issuance of the subpoenas because it pertained to and sought "to regulate . . . a subject matter – the German affiliates' payment or

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[12] We do not decide whether California substantive law should apply to the claims for unpaid labor and personal injuries asserted in this case. We conclude only that section 354.6 may validly be applied to revive and retroactively extend the statute of limitations applicable to such claims.

non-payment of Holocaust-era policy claims – with no jurisdictionally-significant relationship to Florida." (*Id.* at p. 1238.)

By contrast, section 354.6 does not seek to substantively regulate by requiring extensive reporting information to any agency, nor does it provide penalties for failing to do so. Rather, section 354.6 is essentially a procedural statute that permits slave and forced labor victims to adjudicate their claims in California courts. The claims existed prior to the enactment of the statute.

Finally, the fact that section 354.6 extends the applicable statute of limitations retroactively does not violate due process. The retroactive application of a statute is proper as long as the Legislature intended to apply it retroactively, is not an ex post facto law, and does not deprive a person of a vested right without due process of law or impair the obligation of a contract. (*In re Marriage of Buol* (1985) 39 Cal.3d 751, 756, 218 Cal. Rptr. 31, 705 P.2d 354.) No assertion is made that section 354.6 is an ex post facto law, deprives Taiheiyo of a vested right, or impairs the obligation of a contract.

Section 354.6 is similar to statutes that revive the prosecution of otherwise time-barred criminal offenses. (See, e.g., Pen. Code, §§ 803, subds. (f), (g), (h).) Penal Code section 803, subdivision (g), for example, expressly "revived" the prosecution of certain sexual crimes against children in which the three- or six-year statute of limitations expired. In *People v. Frazer, supra*, 21 Cal.4th 737, the Supreme Court upheld the statute against a challenge it violated due process by retroactively reviving a dead cause of action. The Court discussed *Chase Securities Corp. v. Donaldson* (1945) 325 U.S. 304, 89 L. Ed. 1628, 65

S. Ct. 1137, where the U.S. Supreme Court upheld retroactive changes in the applicable limitations period which were detrimental to the defense. The Court concluded, "The holding of *Chase* – that no constitutionally protected interest arises once a statute of limitations has run, and that such protection can be retroactively withdrawn consistent with due process – has been reaffirmed by the high court in subsequent cases. [Citations.] . . . [¶] We see no meaningful basis on which to distinguish the six-year period [in this case] from the statute of limitations discussed in *Chase*. . . . That this case involves a criminal, rather than a civil, statute of limitations is not such a persuasive distinction. No provision of the United States Constitution explicitly confers upon criminal defendants a 'right to repose' by virtue of the length of time between commission of the crime and commencement of the prosecution. . . . [¶] Criminal statutes of limitation are no less an act of 'policy' or 'grace' than their counterparts in civil cases. [Citation.]" (*People v. Frazer, supra*, 21 Cal.4th at pp. 768-770.)

Because the Legislature made clear in enacting section 354.6 that the applicable statute of limitations for slave labor and forced labor claims should be extended retroactively, we conclude retroactivity is proper and does not violate constitutional protections. (See § 354.6, subd. (c); S.B.1245, § 1(d).)

E. *Political Question Doctrine*

Taiheiyo lastly contends lawsuits under section 354.6 raise non-justiciable political questions because they present claims for war reparations, which the Constitution exclusively reserved for the federal government. Taiheiyo

argues the federal government dealt with the issue of Japanese war reparations through the 1951 Treaty and, as a result, California courts may not revisit or subvert this political resolution. We reject this contention.[13]

The "political question doctrine" requires courts to defer to the other branches of government operating within their spheres of authority. (*Schabarum v. California Legislature* (1998) 60 Cal.App.4th 1205, 1213-1214, 70 Cal. Rptr. 2d 745.) The doctrine "compels dismissal of a lawsuit when complete deference to the role of the legislative or executive branch is required and there is nothing upon which a court can adjudicate without impermissibly intruding upon the authority of another branch of government." (*Ibid.*)

Contrary to Taiheiyo's broad assertion that "questions involving interference with foreign relations are quintessential 'political questions,'" the Supreme Court has cautioned against such sweeping statements. (See *Baker v. Carr* (1962) 369 U.S. 186, 211, 7 L. Ed. 2d 663, 82 S. Ct. 691; *Japan Whaling Assn. v. American Cetacean Soc.* (1986) 478 U.S. 221, 229-230, 92 L. Ed. 2d 166, 106 S. Ct. 2860.) In *Japan Whaling Assn. v. American Cetacean Soc., supra,* the United States agreed not to certify Japan was

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[13] Jeong contends Taiheiyo's political question argument is not properly before the court because that argument was raised only in Taiheiyo's initial motion for judgment on the pleadings, which the trial court denied and from which Taiheiyo did not seek appellate review. The order to show cause limited our review to the trial court's denial of Taiheiyo's second motion for judgment on the pleadings, in which the political question argument was not raised. We nonetheless address it because it is an issue of law that was fully briefed and argued by the parties.

in violation of an international whaling treaty. Conservation groups sued to force the Department of Commerce to certify Japan was in violation of the treaty. The district court granted the requested relief.

The Supreme Court rejected the contention asserted by the Japanese petitioners that the political question doctrine barred resolution of the case by the courts. The Court said, "*Baker* carefully pointed out that not every matter touching on politics is a political question. . . . The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch. . . . [¶] As *Baker* plainly held, however, the courts have the authority to construe treaties and executive agreements, and it goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts. . . . Under the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones. We conclude, therefore, that the present cases present a justiciable controversy. . . . " (*Id.* 478 U.S. at pp. 229-230.) Other cases are in accord. (See *Klinghoffer v. S.N.C. Achille Lauro* (2d Cir. 1998) 937 F.2d 44, 49 [political question doctrine did not bar suit against PLO for seizure, beating, and killing of passenger]; *Kadic v. Karadzic* (2d Cir. 1995) 70 F.3d 232, 248-250 [political question doctrine did not bar private tort claims under Alien Tort Act against self-proclaimed president of the unrecognized Bosnian-Serb republic of Srpska for systematic human rights atrocities].)

Courts confronted with actions under section 354.6 are not presented with non-justiciable political questions. Section 354.6 is essentially a procedural statute that revives stale tort and quasi-contract claims for unpaid labor and personal injuries and permits venue in California courts. The Legislature assessed the workload of California courts and determined that public policy mandates a consideration of slave and forced labor claims, despite the length of time that elapsed since the occurrences giving rise to the claims. Not only is the Legislature empowered to enact such laws in an attempt to redress the injuries of its residents, but the adjudication of similar claims is a traditional judicial function courts are called upon to address on a daily basis. Evaluating evidence concerning whether a person suffered personal injuries, was falsely imprisoned, and forced to work without pay is clearly a fact-finding function granted to the judicial branch of government. The performance of that role does not involve addressing political questions or usurp the governmental functions of the legislative and executive branches.

Furthermore, contrary to Taiheiyo's contention that there are no "judicially discoverable and manageable standards" which California courts may apply to claims under section 354.6, standards do in fact exist. As another court concluded, "because the common law of tort provides clear and well-settled rules on which the district court can easily rely, this case does not require the court to render a decision in the absence of 'judicially discoverable and manageable standards.'" (*Klinghoffer v. S.N.C. Achille Lauro, supra*, 937 F.2d at p. 49.)

In sum, Taiheiyo and amici curiae have not cited to any ongoing negotiations by the United States that

address claims such as Jeong's. There is no indication that actions brought under section 354.6 will impermissibly intrude upon the authority or interest of another branch of government.

F. *Conclusion*

By enacting section 354.6, the California Legislature has determined that public policy mandates a judicial consideration of slave and forced labor claims despite the length of time that has elapsed since the occurrence of events underlying those claims. The Legislature has accomplished this policy by retroactively extending the limitations period for narrowly defined categories of pre-existing claims in order to permit the redress of injuries of California residents. This legislative enactment was an appropriate exercise of the state's sovereign powers. We therefore conclude section 354.6 is valid because (1) no federal treaty or other law preempts it, (2) the enactment poses at most merely an incidental or indirect effect on foreign countries, (3) the statute does not violate constitutional due process, and (4) the claims it allows do not present non-justiciable political questions.

DISPOSITION

The petition for writ of mandate is denied, the order to show cause is discharged, and the stay of trial court proceedings previously issued is dissolved. Jeong is awarded his costs.

BOLAND, J.

We concur:
COOPER, P.J.
RUBIN, J.